Supreme Court, U.S.
FILED

62

No. (1) 07-118 JUL 27 2007

OFFICE OF THE CLERK

In The

Supreme Court of the United States

IN RE

ELWOOD CLUCK,

Petitioner.

On Petition For A Writ Of Mandamus Or A Writ Of Prohibition Or Both To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION OR BOTH

ELWOOD CLUCK, Petitioner
No. 2 Comanche Spur
Kerrville, Texas 78028

Tel. 830-896-2685
210-887-9183

QUESTIONS PRESENTED

1. Whether the Indictment accused Petitioner of an Offense against the United States as defined in 28 U.S.C. § 152 in conjunction with 28 U.S.C. § 1746 and thereby established Subject Matter Jurisdiction required by Article III, Section 2, cl. 1 and 4 of the Constitution in the United States District Court to entertain the Indictment, prosecution, Trial, Judgment and Sentence imposed upon Petitioner.

2. Whether Judge Edward C. Prado was disqualified as a United States District Judge pursuant to the Due Process Clause of the Fifth Amendment to the Constitution from presiding during the prosecution, Trial and Judgment imposed upon Petitioner where Judge Prado failed at the inception of the Case to review, analyze and consider the Indictment in the context of 28 U.S.C. § 152 in conjunction with 28 U.S.C. § 1746 to determine whether the Indictment alleged an Offense Against the United States as defined in any of the nine (9) subsections of 28 U.S.C. § 152 and the requirements of 28 U.S.C. § 1746 and thus assure himself of Subject Matter Jurisdiction of the United States District Court pursuant to 28 U.S.C. § 3231 and Article III, Section 2, cl. 1 and 4 of the Constitution.

3. Whether United States District Judge Edward C. Prado was disqualified and erroneously failed to disqualify himself pursuant to 28 U.S.C. § 455(a) and (b)(1) and (3) and the Due Process Clause of the Fifth Amendment to the Constitution from presiding during the prosecution, Trial and Judgment imposed upon Petitioner because Judge Prado had occasion to consider and pass upon of the

QUESTIONS PRESENTED – Continued

circumstances involved in the disposition of a Target Letter and Grand Jury Subpoena addressed to Petitioner's wife by Assistant United States Attorney (AUSA) C. Larry Mathews in prior proceedings.

4. Whether Circuit Judges Jolly, Higginbotham, Jones, Stewart, Weiner and Barksdale and each and every other Judge of the Court of Appeals, Fifth Circuit, who has participated in any hearing and/or on any decision of any question which involved in any degree any matter arising or upon which he had occasion to consider and/or pass upon during the course of one or more of the Appeals prosecuted by Petitioner as Appellant arising out of *United States v. Elwood "Jack" Cluck* (Docket No. SA-95-CR-99-EP or Docket No. SA-95-CR-99(1)-EP or Docket No. SA-99-CA-1417-EP) in the Western District of Texas, San Antonio Division, or *In re: Elwood Cluck, Debtor* (Docket No. 90-50952-K) in the United States Bankruptcy Court, Western District of Texas, San Antonio Division, was disqualified from sitting in the United States Court of Appeals, Fifth Circuit, pursuant to 28 U.S.C. § 455(a) and (b)(1) and (3), and *Moran v. Dillingham,* 174 U.S. 153, 43 L.Ed. 930, 19 S.Ct. 620 (1899); *Rexford v. Brunswick-Baker-Collender Co.*, 228 U.S. 139, 57 L.Ed. 864, 33 S.Ct. 515 (1913) and *Delaney v. United States*, 263 U.S. 586, 44 S.Ct. 206, 68 L.Ed. 462 (1924).

5. Whether retired Senior Circuit Judge Thomas H. Reavely was disqualified from participating in the Panel composed of retired Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides in Docket No. 05-51171, *Elwood Cluck, Petitioner v. United States of America, Respondent*, in the United States Court of Appeals,

QUESTIONS PRESENTED – Continued

Fifth Circuit, by 28 U.S.C. § 294(e) where there is no record establishing the time and date when (or if) retired Senior Circuit Judge Reavely was designated and assigned to the Panel as required by subsections (c) and (d) of 28 U.S.C. § 294.

6. Whether the Opinion, Judgment and Order of Dismissal rendered by the Panel composed of retired Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides is erroneous because retired Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides overlooked or misapprehended and failed to consider and apply the "Separate Document Rule" set forth in Fed R. Civ. Proc. Rule 58 and Fed R. App. Proc. Rule 4(a)(7) and (b)(6).

LIST OF PARTIES

1. United States District Judge Fred Biery, who presided in *Elwood Cluck, Petitioner v. United States of America, Respondent*, in Docket No. SA-95-CR-99-FB in the United States District Court, Western District of Texas, San Antonio Division, presently on Appeal in Docket No. 05-51171, *Elwood Cluck, Petitioner v. United States of America, Respondent*, in the United States Court of Appeals, Fifth Circuit, whose address for service of process is United States Courthouse, 600 East Durango Blvd., San Antonio, Texas 78206.

2. United States District Judge Edward C. Prado, who presided in *United States of America, Plaintiff v. Elwood "Jack" Cluck, Defendant*, Docket No. SA-95-CR-99-EP and Docket No. SA-95-CR-99(1)-EP and Docket No. SA-99-CA-1417-EP in the United States District Court, Western District of Texas, San Antonio Division, and presently sitting Circuit Judge in Docket No. 05-51171, *Elwood Cluck, Petitioner v. United States of America, Respondent*, in the United States Court of Appeals, Fifth Circuit, whose address for service of process is 755 East Mulberry Ave., Suite 350, San Antonio, Texas 78212-3186.

3. United States Court of Appeals, Fifth Circuit, United States Courthouse, 600 Camp Street, New Orleans 70130 whose address for service of process is Mr. Charles R. Fulbruge, Clerk, United States Court of Appeals, United States Courthouse, 600 South Maestri Place, New Orleans, Louisiana 70130.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iv
Table of Contents	v
Table of Authorities	vi
Petition For a Writ of Mandamus or a Writ of Prohibition or Both	1
Basis for Jurisdiction in the Supreme Court	1
Basis for Federal Jurisdiction in the United States District Court	1
Constitutional Provisions and Statutes Involved in the Case	2
Statement of the Case	2
Extraordinary Circumstances That Warrant the Exercise of the Discretionary Powers of the Supreme Court	7
Collateral Consequences	23
Argument Amplifying Reasons for Granting the Writ	26
Prayer for Relief	30

TABLE OF AUTHORITIES

Page

CASE LAW

THE SUPREME COURT

Delaney v. United States, 263 U.S. 586, 44 S.Ct. 206, 68 L.Ed. 462 (1924) 3, 19, 20, 29

Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 684, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982) 8

Lujan v. Defenders of Wildlife, 504 U.S. 555, 112 S.Ct. 2130 (1992) 9

Moran v. Dillingham, 174 U.S. 153, 43 L.Ed. 930, 19 S.Ct. 620 (1899) 3, 19, 20, 29

Rexford v. Brunswick-Baker-Collender Co., 228 U.S. 139, 57 L.Ed. 864, 33 S.Ct. 515 (1913) 3, 19, 20, 29

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 14

Thomson v. Gaskill, 315 U.S. 442, 62 S.Ct. 673 (1942) 9

United States v. Morgan, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954) 2, 5, 9, 22

THE CIRCUIT COURTS OF APPEAL

Harris v. United States, 149 F.3d 1304 (11th Cir. 1998) 8

Howery v. Allstate Insurance Company, 243 F.3d 912 (5th Cir. 2001) 9

In re: Consolidated Bancshares, 785 F.2d 1249 (5th Cir. 1986) 25

TABLE OF AUTHORITIES – Continued

Page

Irwin v. Veterans Administration, 874 F.2d 1092 (5th Cir. 1989), *affd. sub nom., Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453 (1991) 9

Jimenez v. Trominski, 91 F.3d 767 (5th Cir. 1996) 17

Matter of Taxman Clothing Co., 49 F.3d 310 (7th Cir. 1995) 25

Thor v. United States, 554 F.2d 759 (1977) 8

United States v. Cervantes-Pacheco, 826 F.2d 310 (5th Cir. 1987) 12

United States v. Escogbue, 357 F.3d 532 (5th Cir. 2004) 17

United States v. Indoor Cultivation Equipment etc., 55 F.3d 1311 (7th Cir. 1995) 27

United States v. Kimble, 719 F.2d 1253 (5th Cir. 1983) 12

United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005) 17

United States v. Lopez, 2 F.3d at 1368 (5th Cir. 1993) 8

United States v. Schwartz, 785 F.2d 673 (9th Cir. 1986), *cert. den.*, 479 U.S. 890 (1986) 12

BANKRUPTCY COURTS

In re: Arnold, 176 B.R. 13 (Bkr. E.D. Tex. 1995) 25

In re: Toney, 171 B.R. 414 (Bkr. S.D. Fla. 1994) 25

In re: Witts, 1995 W.L. 153017 (Bkr. E.D. Tex. 1995) 25

TABLE OF AUTHORITIES – Continued

Page

DISTRICT COURTS

Brazosport Towing Co. v. 3,838 Tons of Sorghum, 607 F.Supp. 11 (S.D. Tex. 1984) 27

THE CONSTITUTION

Article III, Section 2, cl. 1 of the Constitution ..2, 4, 8, 9, 29

Article III, Section 2, cl. 4 of the Constitution 2, 4, 8, 9

Due Process Clause of the Fifth Amendment to the *Constitution* .....*passim*

Trial by Jury Clause of the Sixth Amendment to the Constitution 2, 3, 24, 27, 29

STATUTES

18 U.S.C. § 152.....*passim*

18 U.S.C. § 201(c)(2)..... 12

18 U.S.C. § 3231..... 8

18 U.S.C. § 3282..... 7

28 U.S.C. § 47.....2, 19, 29

28 U.S.C. § 201(c)(2)..... 12

28 U.S.C. § 294.....21, 29

28 U.S.C. § 455.....*passim*

28 U.S.C. § 1651.....*passim*

28 U.S.C. § 1746.....*passim*

28 U.S.C. § 2253..... 17

28 U.S.C. § 2255.....*passim*

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. § 3231 ..... 2, 8, 9

28 U.S.C. § 3282 7

FEDERAL RULES OF PROCEDURE

Fed. R. App. Proc. Rule 4(a)(1)(B) 21

Fed. R. App. Proc. Rule 4(a)(7) and (b)(6) 18, 22

Fed. R. App. Proc. Rule 4(b)(6) 22

Fed. R. App. Proc. Rule 47(a)(2) 23

Fed. R. Civ.Proc. Rule 8(d) 26

Fed. R. Civ. Proc. Rule 58(a) 22

Fed R. Civ. Proc. Rule 58(a)(1) and (2)(A)(iii) and (B) 18, 22

Fed. R. Civ. Proc. Rule 58(b)(2)(A) and (B) 18, 22

Fed. R. Civ. Proc. Rule 60(b)(4) 5, 6, 18

Fed. R. Crim. Proc. Rule 12(b)(2) 5, 6, 18

Fed. R. Crim. Proc. Rule 29 ..... 5, 18

Fed. R. Crim. Proc. Rule 34 (first sentence) 6, 18

FEDERAL RULES OF EVIDENCE

Fed. R. Evid. Rule 301 9

TABLE OF AUTHORITIES – Continued

Page

SUPPLEMENTAL CITATIONS

Coble Wall Trust Co. v. Palmer, 848 S.W.2d 696 (Tex. App. San Antonio 1991), *writ granted, rev'd and remanded*, 851 S.W.2d 178 (Tex. 1992), *on remand*, 859 S.W.2d 475 (Tex. App. San Antonio 1993), *writ denied* 26

Elwood Cluck, Petitioner v. United States of America, Respondent, Docket No. SA-95-CR-99-FB in the United States District Court, Western District of Texas, San Antonio Division, on Appeal Docket No. 05-51171 in the Court of Appeals, Fifth Circuit ..... iv, 2

Ex Parte Christine A. Cluck, No. 94-CI-15949, 225th Judicial District Court, Bexar County, Texas 11

United States of America, Plaintiff v. Elwood "Jack" Cluck, Defendant, Docket No. SA-95-CR-99-EP in the United States District Court, Western District of Texas, San Antonio Division iv

TEXTS

On Truth (pp 54-55) by Harry A. Frankfurt, published by Alford A. Knopf (2006) 30

PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION OR BOTH

Now comes Elwood Cluck, Petitioner (referred to in the proceedings in the District Court as Elwood "Jack" Cluck, Defendant) and respectfully moves the Supreme Court to issue a Writ of Mandamas or in the alternative, a Writ of Prohibition or both, pursuant to Rule 20 of the Rules of the Supreme Court or in the further alternative, a common law Writ of Certiorari addressed to the Parties named in the forefront of this Petition and grant relief as requested below.

BASIS FOR JURISDICTION IN THE SUPREME COURT

On March 6, 2007, a Panel of the United States Court of Appeals, Fifth Circuit, dismissed Petitioner's Appeal in Docket No. 05-51171 as untimely. Petitioner's Motion for Rehearing was denied on May 1, 2007.

The statutory provision believed to confer jurisdiction on the Supreme Court to review the Opinion and Judgment referred to above and the Judgment entered on May 28, 1997 by the United States District Court (Judge Edward C. Prado presiding) for Lack of Subject Matter Jurisdiction and Constitutional Violations and the Opinions and Orders entered by the United States District Court (Judge Fred Biery presiding) entered on April 6, 2005, May 16, 2005, June 9, 2005, August 31, 2005 and October 14, 2005 is set out in 28 U.S.C. § 1651.

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

On March 25, 2005, after exhausting all other available remedies, Petitioner filed a Motion authorized by

United States v. Morgan, 346 U.S. 502 at 505 note 4, 74 S.Ct. 247, 98 L.Ed. 248 (1954) pursuant to 28 U.S.C. § 1651 to Vacate and Set aside the Judgment entered on May 28, 1997 by the United States District Court (Judge Edward C. Prado presiding) for Lack of Subject Matter Jurisdiction and Constitutional Violations. (Docket Entry No. 342). The statutory provision believed to confer jurisdiction on the United States District Court, Judge Fred Biery presiding, to review the May 28, 1997 Judgment entered by Judge Prado for Lack of Subject Matter Jurisdiction and Constitutional Violations is set out in 28 U.S.C. § 3231 in conjunction with 28 U.S.C. § 1651.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Article III, Section 2, cl. 1 of the Constitution; Due Process Clause of the Fifth Amendment to the Constitution; Trial by Jury Clause of the Sixth Amendment to the Constitution.

STATEMENT OF THE CASE

This Case[1] involves the requirement of Subject Matter Jurisdiction required by Article III, Section 2, cls. 1 and 4 of the Constitution as a prerequisite for the United States District Court to entertain the prosecution, Trial, Judgment and Sentence imposed upon Petitioner for alleged violations of 18 U.S.C. § 152 and 28 U.S.C. § 1746. The Case also involves the application of 28 U.S.C. § 47 and § 455(a) and (b)(1) and (3) and the Rules of Law established by the

---

[1] *Elwood Cluck, Petitioner v. United States of America, Respondent,* Docket No. SA-95-CR-99-FB in the United States District Court, Western District of Texas, San Antonio Division, on Appeal in Docket No. 05-51171 in the Court of Appeals, Fifth Circuit.

Supreme Court[2] and the Due Process Clause of the Fifth Amendment and Trial by Jury Clause of the Sixth Amendment to the Constitution.

The Case was initiated on March 27, 1995 by an Indictment (App. 17) drafted by Assistant United States Attorney (AUSA) Mathews which sets forth multiple accusations against Petitioner described in eight Counts, each of which concluded with tne phrase "All in violation of Title 18, United States Code, Section 152." Section 152 sets forth nine (9) subsections, each of which describe and define a separate and distinct Offense Against the United States. However, none of the nine (9) subdivisions of § 152 were identified or referred to in any of the eight accusatory Counts of the Indictment. The Indictment simply failed to allege an Offense against the United States as defined in any of the nine (9) subsections of 18 U.S.C. § 152 in conjunction with 28 U.S.C. § 1746. Consequently, the United States District Court failed to acquire Subject Matter Jurisdiction in this Case.

The Case was initially assigned to Judge Hippolito F. Garcia who recused himself from the proceedings pursuant to 28 U.S.C. § 455(b)(1) and (3) because of his personal knowledge and familiarity with the bankruptcy proceedings[3] in which Judge Garcia had previously expressed a series of opinions concerning the merits of the Case. At the request of AUSA Mathews, the District Clerk assigned the Case to Judge Edward C. Prado for prosecution and Trial

---

[2] *Moran v. Dillingham,* 174 U.S. 153, 19 S.Ct. 620, 43 L.Ed. 930 (1899); *Rexford v. Brunswick-Baker-Collender Co.*, 228 U.S. 139, 33 S.Ct. 515, 57 L.Ed. 864 (1913) and *Delaney v. United States*, 263 U.S. 586, 44 S.Ct. 206, 68 L.Ed. 462 (1924).

[3] A summary of the bankruptcy proceedings is set out in App. 18, Par. 1-46.

based on the Indictment prepared by AUSA Mathews. (App. 18, Par. 53-55).

At the outset, Judge Prado was required to review the Indictment for jurisdictional purposes in the context of 18 U.S.C. § 152 and 28 U.S.C. § 1746 to determine whether the Indictment accused Petitioner of an Offense Against the United States and thereby establish Subject Matter Jurisdiction required by Article III, Section 2, cls. 1 and 4 of the Constitution. Judge Prado failed to do so.

AUSA Mathews was also required but failed to offer proof and refute the initial presumption of Lack of Subject Matter Jurisdiction. Judge Prado did not inquire into AUSA Mathews' default and proceeded to Trial based on the defective Indictment without having satisfied the prerequisite Subject Matter Jurisdiction. At the conclusion of the Trial, Judge Prado submitted the defective Indictment to the Jury which found Petitioner guilty of seven of the eight Count Indictment. There was no finding or verdict by the Jury that Petitioner committed an Offense against the United States as defined in any of the nine (9) subsections of 18 U.S.C. § 152. Nevertheless, Judge Prado sentenced Petitioner to Imprisonment for a term of two years followed by Supervised Release for a term of three years plus Restitution in the amount of $185,000. (App. 8). The Judgment was signed and entered by Judge Prado on May 28, 1997. The Court of Appeals, Fifth Circuit, affirmed the Judgment in an Opinion dated June 3, 1998 reported at 87 F.3d 138 (5th Cir. 1996).

While incarcerated, Petitioner filed a motion pursuant to 28 U.S.C. § 2255 which was denied by Judge Prado (App. 9-11) and affirmed by the Court of Appeals in an unpublished Opinion. (App. 12). Petitioner completed serving the sentence of two years Imprisonment plus three years of Supervised Release imposed by the Judgment and

was released from "custody" of the Attorney General of the United States on February 24, 2003.

On March 25, 2005, Petitioner filed a Motion pursuant to 28 U.S.C. § 1651 to Vacate and Set aside the May 28, 1997 Judgment entered by Judge Prado for Lack of Subject Matter Jurisdiction and Constitutional Violations. Petitioner's Motion was not a new civil action but instead was a further step in the original criminal proceedings. *United States v. Morgan*, 346 U.S. 502 at 505 note 4, 74 S.Ct. 247, 98 L.Ed. 248 (1954). On April 6, 2005, United States District Judge Fred Biery *sua sponte* denied Petitioner's March 25, 2005 Motion (App. 1) without Notice and without a Hearing on the grounds that:

> [Petitioner] may not proceed with the current Motion without an order from the Fifth Circuit authorizing him to proceed. His current filings are not accompanied by such a Fifth Circuit order and thus this Court may not proceed with his Motion.

Petitioner filed a Motion requesting Judge Biery to reconsider his April 6, 2005 Order and subsequently filed a Request for an Evidentiary Hearing, a Request for Findings of Fact and Conclusions of Law, a Request to the Clerk for Entry of Default and a Motion to the Court for Entry of Judgment of Acquittal pursuant to Fed. R. Crim. Proc. Rule 29, Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. Proc. Rule 60(b)(4). Neither AUSA Mathews nor any other United States Attorney appeared or responded to Petitioner's March 25, 2005 Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction or Petitioner's Motion to Reconsider Judge Biery's April 6, 2005 Order dismissing Petitioner's Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction or Petitioner's Motion for Entry of Judgment of Acquittal pursuant to Fed. R. Crim.

Proc. Rule 29, Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. Proc. Rule 60(b)(4).

Notwithstanding the failure of AUSA Mathews and/or the United States Attorney to appear and controvert Petitioner's Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction, Judge Biery *sua sponte* successively denied each of the Motions and Requests listed above on May 16, 2005 and June 9, 2005 respectively. (App. 2 and 3). Petitioner filed Notice of Appeal on July 28, 2005 with respect to Judge Biery's Orders dated April 6, 2005, May 16, 2005 and June 9, 2005. Judge Biery entered an Order denying Petitioner's Notice of Appeal on August 31, 2005 (App. 4) and Petitioner filed a Supplemental Notice of Appeal on September 30, 2005 which Judge Biery denied on October 14, 2005. (App. 5).

Petitioner thereafter mailed a Motion to Disqualify Judge Prado[4] and other Circuit Judges and his Opening Brief and a further Motion to Vacate the Opinions and Judgments rendered by the Court of Appeals, Fifth Circuit, in Docket No. 95-50754, Docket No. 97-50444, Docket No. 00-50952 con/w No. 01-50581 and, finally, a supplemental Motion to Vacate the Judgment of the District Court and Remand the Case to the District Court with Instructions for Entry of a Judgment of Acquittal. The Clerk refused to file Petitioner's Opening Brief or his Motion to Disqualify Judge Prado and other named Circuit Judges or Petitioner's supplemental Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction and Remand the

---

[4] Judge Prado was appointed Circuit Judge, the Court of Appeals, Fifth Circuit, on May 14, 2003. An Affidavit in Support of Petitioner's Objections and Motion to Disqualify Judge Prado and other Appellate Judges is attached to Petitioner's Motion to Disqualify Circuit Judge Prado and other Circuit Judges. (App. 18).

Case to the District Court with Instructions for Entry of a Judgment of Acquittal.

Neither AUSA Mathews nor any other United States Attorney appeared and contested Petitioner's Appeal or either of Petitioner's Motion to Disqualify Judge Prado and other named Circuit Judges or Petitioner's Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction and Remand the Case to the District Court for Entry of Judgment of Acquittal. Nevertheless, after a lapse of nearly two years, a Panel of the United States Court of Appeals composed of retired Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides *sua sponte* rendered an Opinion and entered Judgment (App. 6) on March 6, 2007 holding that Petitioner's Notice of Appeal filed on July 28, 2005 was untimely. Petitioner filed a Motion for Rehearing to Vacate the Panel Opinion and Judgment on March 19, 2007 (App. 7) which was denied on May 1, 2007.

EXTRAORDINARY CIRCUMSTANCES THAT WARRANT THE EXERCISE OF THE DISCRETIONARY POWERS OF THE SUPREME COURT

The fact that the Indictment failed to allege an Offense against the United States as defined in either of the nine (9) subsections of 18 U.S.C. § 152 is not disputed by AUSA Mathews or any other United States Attorney in either the District Court or in the Court of Appeals. Moreover, the fact that the Indictment also failed to allege a specific date (i.e., month, day and year) within the five year general Statute of Limitations established by 18 U.S.C. § 3282 (required by the third element in the definition of an Unsworn Declaration under Penalty of Perjury set forth in 28 U.S.C. § 1746) is likewise undisputed. Finally, the fact that the Indictment

failed to refer to and describe the "materiality" of the accusations made against Petitioner to the circumstances described in any of the nine subsections of 18 U.S.C. § 152 or 28 U.S.C. § 1746 is also undisputed.

Since it is undisputed that the Indictment failed to allege an Offense against the United States,[5] it necessarily follows that the United States District Court failed to acquire Subject Matter Jurisdiction under 28 U.S.C. § 3231[6] as required by Article III, Section 2, cls. 1 and 4 of the Constitution to entertain the prosecution and maintain the Trial and impose Judgment upon Petitioner.[7]

At the outset of this Case on March 27, 1995, Judge Prado was charged with the judicial obligation and duty under 28 U.S.C. § 3231 and the Due Process Clause of the Fifth Amendment to review the Indictment in the context of Article III, Section 2 of the Constitution and assure both himself and Petitioner that the United States District Court acquired and maintained Subject Matter Jurisdiction pursuant to the Constitution to entertain the Trial

---

[5] *United States v. Lopez*, 2 F.3d 1342 at 1368 (5th Cir. 1993) ("An indictment that fails to allege . . . a necessary element of the offense is defective. . . . Finally, because an indictment, unlike a bill of information, cannot be amended, the failure to allege each element is fatal." (citations omitted).

[6] *Thor v. United States*, 554 F.2d 759 at 762 (1977) ("If the indictment upon which [Petitioner] was tried and convicted failed to allege a federal offense, the district court lacked the subject matter jurisdiction necessary to try [Petitioner] for the actions alleged in the indictment. *See* 18 U.S.C. § 3231 (1970).").

[7] *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) ("As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites*, 456 U.S. 684, 701-02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). We therefore cannot derive power to act from the actions of the parties before us. *See id.* at 702.").

and impose Judgment upon Petitioner. (App. 18, Par. 56-61).

The failure of the Indictment to allege the commission of an Offense Against the United States as defined in one or more of the nine (9) subsections of 18 U.S.C. § 152 in conjunction with 28 U.S.C. § 1746 is readily apparent on the face of the Indictment. Judge Prado's failure to undertake and discharge his judicial obligation and duty to determine whether the Indictment alleged an Offense Against the United States and thus establish Subject Matter Jurisdiction in the District Court pursuant to Article III, Section 2, cl. 1 and 4 of the Constitution and 28 U.S.C. § 3231 constitutes an error "of the most fundamental character" (*United States v. Morgan*, supra) and, as shown below, demonstrates a pervasive bias and prejudice exercised by Judge Prado in favor of the United States and against Petitioner. (App. 18, Par. 47-50).

Upon Petitioner's Plea of Not Guilty, AUSA Mathews, as Attorney of Record for the United States, was required at the inception of the Case to prove the existence of an Offense Against the United States by a preponderance of the evidence[8] in order to establish Subject Matter Jurisdiction[9] in the District Court to entertain the Indictment and Trial and impose Judgment upon Petitioner. AUSA Mathews had both the burden of proof and the burden of going forward with evidence pursuant to Fed. R. Evid. Rule 301 to meet the initial presumption of lack of Subject

---

[8] *Irwin v. Veterans Administration*, 874 F.2d 1092, 1096 (5th Cir. 1989), *affd. sub nom. Irwin v. Dep. of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453 (1991).

[9] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 561, 112 S.Ct. 2130, at 2136 (1992); *Thomson v. Gaskill*, 315 U.S. 442, at 446, 62 S.Ct. 673, at 675 (1942); *Howery v. Allstate Insurance Company*, 243 F.3d 912, at 916 (5th Cir. 2001).

Matter Jurisdiction arising. The burden of proof in the sense of the risk of nonpersuasion remained throughout the Trial in the District Court and on appeal in the Court of Appeals upon AUSA Mathews on whom it was originally cast. However, AUSA Mathews failed both in the District Court and later in the Court of Appeals to undertake and discharge his burden of proof to establish that the United States District Court had Subject Matter Jurisdiction to entertain the Indictment, Trial, Judgment and Imprisonment of Petitioner in this Case. (App. 18, Par. 66-73).

Implicit in his legal duty and judicial obligation under the Constitution to determine Subject Matter Jurisdiction, not only for himself but also for protection of the accused, Judge Prado was procedurally required and judicially obligated to inquire into and seek an explanation from AUSA Mathews for his failure to rebut the initial presumption of lack of Subject Matter Jurisdiction in the District Court. Judge Prado ignored AUSA Mathews' failure to undertake and discharge his burden of proof to establish Subject Matter Jurisdiction required by Article III of the Constitution but, through deference to the office of the United States Attorney or because of bias against Petitioner, Judge Prado made no inquiry to AUSA Mathews regarding the lack of Subject Matter Jurisdiction in the District Court to entertain the Indictment and Trial and impose Judgment upon Petitioner.

Judge Prado's silence portrays a tolerant bias in favor of AUSA Mathews or, if intentional, a *de facto* "cover-up" of the prosecutorial failure on the part of AUSA Mathews in drafting of the Indictment and his subsequent failure to respond to the initial presumption of lack of Subject Matter Jurisdiction in the District Court. (App. 18, Par. 66-73). A reasonable person being informed of the circumstances described above would harbor doubts about Judge Prado's impartiality. Judge Prado was therefore required

by 28 U.S.C. § 455(a) to disqualify himself in the present proceeding because his impartiality might reasonably be questioned.

Judge Prado also had personal knowledge of disputed evidentiary facts concerning this Case, derived from the testimony, evidence, agreements and undertakings between AUSA Mathews and Petitioner's former wife, Kristine Cluck[10] which were presented to and approved by Judge Prado in 1992, approximately three years prior to the Indictment, in proceedings extra-judicial to this proceeding (App. 18, Par. 23-35). Consequently, Judge Prado was also required to disqualify himself pursuant to 28 U.S.C. § 455(b)(1) and (3).[11]

In the earlier proceedings referred to above, AUSA Mathews agreed to forego prosecution of a "Target Letter" and a subpoena addressed to Kristine A. Cluck requiring her compelled testimony before the Grand Jury in exchange for the agreement of Kristine A. Cluck to cooperate with, assist and provide testimony, exhibits and evidence requested by AUSA Mathews in connection with the preparation of the Indictment and subsequent prosecution, Trial, conviction and sentencing of Petitioner.

---

[10] Petitioner married Christine Arlitt Groos on July 27, 1984. On November 3, 1994, Christine A. Cluck changed her name to Kristine Arlitt (No. 94-CI-15949, *Ex Parte Christine A. Cluck*, in the 225th Judicial District Court, Bexar County, Texas), On April 27, 1995, precisely 30 days after the Indictment, Kristine Arlitt filed her Petition for Divorce (No. 95-CI-0598 in the 166th Judicial District Court, Bexar County, Texas) which was granted on May 6, 1996.

[11] 28 U.S.C. § 455: (a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding . . . (b)(3) Where he has . . . expressed an opinion concerning the merits of the particular case in controversy.

The particularly self-serving agreements entered into by Kristine Cluck with AUSA Mathews and approved and ratified by Judge Prado, motivated by her sense of "self preservation" (see *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir. 1983)) in order to avoid further appearances before the Grand Jury and obtain additional leniency and absolution from potential criminal implications in connection with the investigation and prosecution of charges of bankruptcy fraud asserted by AUSA Mathews against Petitioner inexorably tainted the subsequent criminal proceedings[12] and contravened the explicit purposes of 18 U.S.C. § 201(c)(2) to establish truthfulness of all further proceedings free of all influences of deceit, misstatements of fact and outright lies.

In consideration of and in compliance with his agreements for leniency, AUSA Mathews held all proceedings against Kristine Arlitt in abeyance subject to her continued assistance to AUSA Mathews in prosecuting the Indictment against Petitioner on March 27, 1995. The intimidating actions of AUSA Mathews in violation of 28 U.S.C. § 201(c)(2) were ethically and morally reprehensible. Judge Prado, however, participated in and approved the agreements and undertakings on the part of Kristine Cluck elicited by AUSA Mathews[13] but thereafter failed

---

[12] *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . "); *United States v. Schwartz*, 785 F.2d 673, 690 (9th Cir. 1986) ("A violation of trust which is influenced by the offer of an intangible service is no less damaging . . . than if the influence was in the form of a cash kickback."), *cert. den.*, 479 U.S. 890 (1986).

[13] Judge Prado, after hearing questions addressed to Kristine Arlitt by AUSA Mathews and her testimony and representations of facts regarding the pre-bankruptcy sale of the automobiles, pickup, camper, boat and airplane on March 26-29, 1990 followed by her testimony

(Continued on following page)

and refused to disqualify himself as required by 28 U.S.C. § 455(b)(1) and (3) from presiding during the subsequent prosecution, Trial and Judgment imposed upon Petitioner with the resulting detriment and prejudice to Petitioner described below

On March 28, 1995, Petitioner voluntarily surrendered to the United States Marshals Service and was immediately incarcerated at the United States Courthouse, San Antonio, Texas. Petitioner entered a Plea of Not Guilty to the accusations set forth in the Indictment and was released on bond.

With borrowed funds, Petitioner retained Jack Paul Leon, Attorney at Law, San Antonio, Texas to represent Petitioner in the forthcoming proceedings. In September 1995, Jack Paul Leon filed a Motion for Withdrawal based on his allegation of "unhappy differences" which arose between Mr. Leon and Petitioner. Upon withdrawal of Jack Paul Leon, Judge Prado appointed R. Clark Adams, Attorney at Law, Office of the Public Defender, San Antonio, Texas to represent Petitioner. In the early fall of 1996, the Public Defender filed a Motion for Withdrawal and thereafter Royal K. Griffin, Attorney at Law, San Antonio, Texas was employed to represent Petitioner in the forthcoming Trial scheduled to commence on January 6, 1997.

---

regarding the post-bankruptcy purchase of the automobiles, pickup, camper, boat and airplane by First Capital Mortgage Company, Inc., held Kristine guilty of contempt of Court in refusing to answer AUSA Mathews' questions in the presence of Judge Prado in regard to the foregoing matters. Judge Prado's Order was appealed to the Court of Appeals, Fifth Circuit. The results are unknown to Petitioner because Judge Prado Ordered the Record of the proceedings sealed.

Neither Jack Paul Leon nor the Public Defender nor Royal Griffin filed any objections with Judge Prado regarding the failure of the Indictment to allege an Offense Against the United States or the lack of Subject Matter Jurisdiction or the failure of AUSA Mathews to rebut the initial presumption of lack of Subject Matter Jurisdiction or the failure of Judge Prado to require AUSA Mathews to account for the omissions and deficiencies in the Indictment. Obviously, neither Jack Paul Leon nor the Public Defender nor Royal Griffin provided reasonably effective assistance of Counsel to Petitioner as required by the Fifth Amendment to the Constitution. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The prosecution by AUSA Mathews and Trial before a Jury with Judge Prado presiding began on January 6, 1997 and resulted in conviction of Petitioner on seven of the eight Counts of the Indictment. (App. 8 and App. 18, Par. 79-87). Judge Prado entered Judgment on May 28, 1997 (App. 8) and sentenced Petitioner to two years Imprisonment plus three years of Supervised Release plus $185,000 Restitution. (App. 18, Par. 88-104).

The May 28, 1997 Judgment entered by Judge Prado was void due to Lack of Subject Matter Jurisdiction and defective due to Judge Prado's violation of 28 U.S.C. § 455(a) and (b)(1) and (3). Petitioner gave Notice of Appeal to the United States Court of Appeals, Fifth Circuit, where a Panel of the Court of Appeals composed of Circuit Judges Jolly, Jones and Stewart affirmed the May 28, 1997 Judgment entered by Judge Prado in an Opinion reported at 87 F.3d 138 (5th Cir. 1998). (App. 18, Par. 105-111).

On August 14, 1998, Petitioner was re-arrested and incarcerated at the Old Bexar County Jail in San Antonio, Texas. (App. 18, Par. 113-117 and attached Appendix A). On August 19, 1998, Petitioner was transported to the Federal

Correctional Institution at Three Rivers, Texas. While confined at FCI Three Rivers, Petitioner obtained a copy of the Indictment issued by the Grand Jury on March 27, 1995. On November 28, 1999, Petitioner filed a *pro se* Motion pursuant to 28 U.S.C. § 2255 to Set Aside and Vacate the Conviction and Sentence imposed against Petitioner in Docket No. SA-95-CR-099 (EP) on the grounds that the Indictment failed to accuse Petitioner of an Offense against the United States as defined in 18 U.S.C. § 152 and 28 U.S.C. § 1746 thereby resulting in a lack of Subject Matter Jurisdiction and a complete miscarriage of justice. (App. 18, Par. 118-130). On July 25, 2000, Judge Prado denied Petitioner's § 2255 Motion (App. 9) on the procedural grounds that

> [T]he issues raised in [Petitioner's Sec. 2255 Motion] either was raised in the direct appeal or could have been raised in that appeal.... Petitioner has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors. Therefore the Court cannot reach the merits of the Petitioner's motion and will again deny the section 2255 motion.

By shifting the burden of proof to Petitioner to demonstrate why Petitioner failed to raise the issue of Subject Matter Jurisdiction in his direct appeal, Judge Prado avoided accountability for abdication of his judicial obligation and duty to ascertain Subject Matter Jurisdiction at the inception of this Case and relegated the failure of AUSA Mathews to prove Subject Matter Jurisdiction to a subliminal issue in this Case.

Petitioner filed a *pro se* Appeal to the Court of Appeals, Fifth Circuit. (App. 10-14 and App. 18, Par. 128-135). On October 5, 2001 a Panel of the Court of Appeals composed of Circuit Judges Higginbotham, Weiner and Barksdale compounded the erroneous dismissal of Petitioner's Appeal on the procedural grounds that:

> [Petitioner] is therefore required to demonstrate cause for his procedural default and actual prejudice resulting from [his] claim that an indictment is so deficient as to deprive the convicting court of jurisdiction presents an issue that is cognizable under a 28 U.S.C. Sec. 2255 motion . . .

(App. 12).

On January 4, 2002, Petitioner filed a *pro se* Petition for a Writ of Certiorari (Docket No. 01-1161) to review the October 5, 2001 Order of the Court of Appeals referred to above and on March 18, 2002, the Supreme Court denied the Petition for a Writ of Certiorari. (App. 18, Par. 136).

Petitioner completed serving the Sentence of two years Imprisonment plus three years of Supervised Release imposed by Judge Prado in his May 28, 1997 Judgment on February 24, 2003. After completion of his Sentence of two years imprisonment plus three years Supervised Release, Petitioner filed a *pro se* Motion on March 25, 2005 pursuant to 28 U.S.C. § 1651 to Vacate and Set aside the May 28, 1997 Judgment entered by Judge Prado for Lack of Subject Matter Jurisdiction and Constitutional Violations. (Docket Entry No. 342).

Petitioner's March 25, 2005 Motion was assigned to United States District Judge Fred Biery who *sua sponte* denied Petitioner's March 25, 2005 Motion on April 6, 2005 (App. 1) without Notice or a Hearing and with no opportunity afforded to Petitioner to present testimony and/or evidence and/or Arguments and Authorities in support of or with respect to Petitioner's March 25, 2005 Motion on the grounds that

> [Petitioner] filed a previous 28 U.S.C. Sec. 2255 Motion to Vacate (Docket Entry # 291) that was denied on July 25, 2000 (Docket Entry ## 302 & 309). . . . Thus [Petitioner] may not proceed with the current Motion without an order from the

> Fifth Circuit authorizing him to proceed. His current filings are not accompanied by such a Fifth Circuit order and thus this Court may not proceed with his Motion. (App. 1).

28 U.S.C. § 2255 is limited to a "person in custody pursuant to the sentence of a federal district court who claims the sentence is subject to collateral attack –." Petitioner was not in "custody" of the Attorney General of the United States or otherwise "pursuant to the sentence of a federal district court" on March 25, 2005 when Petitioner filed his Motion to Vacate and Set aside the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction. The "custody" requirement is jurisdictional and therefore Judge Biery lacked Subject Matter Jurisdiction to entertain a Section 2255 Motion on behalf of Petitioner who was not in "custody" on March 25, 2005.

Moreover, Judge Biery declined to apply the precedents established by the Court of Appeals, Fifth Circuit,[14] and erred in dismissing Petitioner's Motion.[15] Petitioner filed a Motion requesting reconsideration of Judge Biery's April 6, 2005 Order, a Request for an Evidentiary Hearing, a Request for Findings of Fact and Conclusions of Law, a Request to the Clerk for Entry of Default and a Motion to the Court for Entry of Judgment of Acquittal pursuant to

---

[14] *United States v. Escogbue*, 357 F.3d 532, 534-35 (5th Cir. 2004) (since Escogbue was no longer in custody at the time he filed his petition for Writ of Error *Coram Nobis* relief and therefore was not entitled to relief under 28 U.S.C. § 2255, the District Court had jurisdiction to hear and determine the petition for Writ of Error *Coram Nobis* under 28 U.S.C. § 1651 (citing *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996)).

[15] *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) (The Certificate of Appealability requirement of 28 U.S.C. § 2253(c)(1) does not apply to *Coram Nobis* proceedings pursuant to 28 U.S.C. § 1651).

Fed. R. Crim. Proc. Rule 29, Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. Proc. Rule 60(b)(4).

Neither AUSA Mathews nor any other United States Attorney appeared to controvert or dispute Petitioner's March 25, 2005 Motion to Vacate and Set Aside the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction or Petitioner's Motion for Reconsideration or Petitioner's Motion for Entry of Judgment of Acquittal pursuant to Fed. R. Crim. Proc. Rule 29, Rule 12(b)(2), the first sentence of Rule 34 and Fed. R. Civ. Proc. Rule 60(b)(4), each of which Judge Biery denied on May 16, 2005 and June 9, 2005. (App. 3). Petitioner filed Notice of Appeal on July 28, 2005. Judge Biery denied Petitioner's July 28, 2005 Notice of Appeal on August 31, 2005 (App. 4), and Petitioner filed a Supplemental Notice of Appeal on September 20, 2005 which Judge Biery denied on October 14, 2005. (App. 5).

Neither the Clerk nor Judge Biery prepared, signed and/or entered a separate document in either the Civil Docket or the Criminal Docket setting forth an Order or Judgment denying Petitioner's March 25, 2005 Motion to Vacate and Set aside the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction or Petitioner's April 20, 2005 Motion to Reconsider the Order of the Court dated April 6, 2005 (Docket Entry No. 349) or Petitioner's Request For an Evidentiary Hearing or Findings of Fact and Conclusions of Law or Motion for Acquittal as required by Fed. R. Civ. Proc. Rule 58(a)(1) and (2)(A)(iii) and (B) and Rule 58(b)(2)(A) and (B), and Fed. R. App. Proc. Rule 4(a)(7) and (b)(6).

On January 17, 2006, Petitioner mailed a Motion and Affidavit (App. 18) to the Clerk, United States Court of Appeals, Fifth Circuit, in support of Petitioner's Motion to Disqualify Circuit Judge Prado and other Circuit Judges specified below from sitting in the United States Court of

Appeals, Fifth Circuit, and participating in any hearing and/or on any decision of any question which involved in any degree any matter arising or upon which he or they had occasion to consider and/or pass upon either in the United States District Court or in the United States Court of Appeals, Fifth Circuit. The Motion was based on 28 U.S.C. § 47 and § 455(a) and (b)(1) and (3) and the Rules of Law established by the Supreme Court in *Moran v. Dillingham, Rexford v. Brunswick-Baker-Collender Co.* and *Delaney v. United States* referred to in footnote 2 above and the Due Process Clause of the Fifth Amendment to the Constitution.

On February 14, 2006, Petitioner mailed his Opening Brief and Appendix to the Clerk, United States Court of Appeals, Fifth Circuit, in Support of his Motion to Vacate and Set Aside the Judgment entered May 28, 1997 for Lack of Subject Matter Jurisdiction and Constitutional Violations.

On July 11, 2006 Petitioner mailed his Motion to the Clerk, United States Court of Appeals, Fifth Circuit, to Vacate the Opinions and Judgments rendered by the following Circuit Judges:

> (a) Circuit Judges Jolly, Jones and Stewart in Docket No. 95-50754, *United States of America, Plaintiff-Appellee v. Elwood Cluck, Defendant-Appellant*, reported at 87 F.3d 138 (5th Cir. 1996); and
>
> (b) Circuit Judges Jolly, Higginbotham and Wisdom in Docket No. 97-50444, *United States of America, Plaintiff-Appellee v. Elwood Cluck, Defendant-Appellant*; and
>
> (c) Circuit Judges Higginbotham, Weiner and Barksdale, in Docket No. 00-50952 con/w No. 01-50581, *United States of America, Plaintiff-Appellee v. Elwood Cluck Defendant-Appellant*,

due to disqualifications of the Circuit Court Judges named above occasioned by violations of the Due Process Clause

of the Fifth Amendment and 28 U.S.C. § 455(a) and (b)(1) and (3) and the Rules of Law established by the Supreme Court in *Moran v. Dillingham, Rexford v. Brunswick-Baker-Collender Co.* and *Delaney v. United States.*

On September 15, 2006, Petitioner mailed his supplemental Motion (citing *United States v. Strain*, 396 F.3d 689 (5th Cir. 2005), *reh. den.*, 407 F.3d 379 (5th Cir. 2005)) to the Clerk, Court of Appeals, Fifth Circuit, to Vacate and Set Aside the Judgment entered on May 28, 1997 by Judge Prado for Lack of Subject Matter Jurisdiction and Constitutional Violations and Remand the Case to the United States District Court with Instructions for Entry of a Judgment of Acquittal.

The Clerk refused to file Petitioner's Motions for Disqualification of Circuit Judge Prado, and Circuit Judges Jolly, Jones and Stewart (Docket No. 95-50754) and Circuit Judges Jolly, Higginbotham and Wisdom (Docket No. 97-50444) and Circuit Judges Higginbotham, Weiner and Barksdale (Docket No. 00-50952 con/w No. 01-50581).

The Clerk also refused to file Petitioner's Opening Brief and Appendix in Support of his Motion to Vacate and Set Aside the Judgment entered May 28, 1997 for Lack of Subject Matter Jurisdiction and Petitioner's supplemental Motion to Vacate and Set Aside the Judgment entered on May 28, 1997 by Judge Prado for Lack of Subject Matter Jurisdiction and Remand the Case to the District Court with Instructions for Entry of a Judgment of Acquittal.

On March 4, 2007, Petitioner mailed a Letter by United States First Class Certified Mail RRR to Honorable Edith H. Jones, Chief Judge, United States Court of Appeals, Fifth Circuit, respectfully requesting Chief Judge Jones to Order the Clerk to promptly randomly select and assign qualified sitting Circuit Judges to constitute a Panel designated for

the purpose of Hearing arguments and authorities set out in Petitioner's Opening Brief and Appendix and Petitioner's Motion to Vacate the May 28, 1997 Judgment and Remand the Case to the District Court with Instructions for Entry of a Judgment of Acquittal. Petitioner contemporaneously furnished a copy of his March 4, 2007 Letter addressed to Chief Judge Jones to the Clerk.

Chief Judge Jones referred Petitioner's March 4, 2007 Letter to retired Senior Circuit Judge Thomas H. Reavely[16] and immediately thereafter on March 6, 2007, a Panel of the United States Court of Appeals composed of retired Senior Circuit Judge Reavely[17] and Circuit Judges DeMoss and Benevides *sua sponte* rendered an Opinion holding that Petitioner's Notice of Appeal filed on July 28, 2005 was untimely as follows:

> In this successive civil suit brought by a former federal prisoner under 28 U.S.C. Sec. 2255, the district court entered an order on April 7, 2005, denying the motion to vacate the sentence and conviction. In a civil case in which the United States is a party, a notice of appeal, to be timely, must be filed within sixty days after the entry of

---

[16] 28 U.S.C. § 294(b):

"Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d)."

[17] 28 U.S.C. § 294(e): "No retired Justice or judge shall perform judicial duties except when designated and assigned" as provided in subsections (c) and (d) of 28 U.S.C. § 294. There is no record establishing the time and date when retired Senior Circuit Judge Reavely was designated and assigned to the Panel composed of Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides.

> the order or judgment appealed from. *See*: Fed. R. App. P. 4(a)(1)(B). Thus, the notice had to be filed on or before June 6, 2005. The petitioner dated his notice of appeal July 25, 2005, and it was filed in the district court on July 28, 2005. The notice was clearly untimely. (App. 6).

The Opinion, Judgment and Order of Dismissal rendered by the Panel composed of retired Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides is clearly erroneous. The Panel overlooked and failed to calculatae the date for filing a Notice of Appeal pursuant to the "Separate Document Rule" [18] set forth in Fed. R. Civ. Proc. Rule 58(a)(1) and (2)(A)(iii) and (B) and Rule 58(b)(2)(A) and (B) and Fed. R. App. Proc. Rule 4(a)(7) and (b)(6).

Moreover, Petitioner was not a "person in custody pursuant to the sentence of a federal district court" when he filed his March 25, 2005 Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction and consequently 28 U.S.C. § 2255 is inapplicable. Petitioner's March 25, 2005 Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction pursuant to 28 U.S.C. § 1651 is not a new civil action but instead is a further step in the original criminal proceedings rather than a "successive civil suit brought by a former federal prisoner under 28 U.S.C. § 2255." *United States v. Morgan* (supra, footnote 2 above).

On March 19, 2007, Petitioner timely mailed his Motion for Rehearing to Vacate the Opinions, Order of

---

[18] "Every judgment must be set forth on a separate document [which] the clerk must, without awaiting the court's direction, promptly prepare, sign, and enter the judgment where the court denies all relief. [T]he court must promptly approve the form of the judgment which the clerk must promptly enter. Judgment is entered when it is set forth in a separate document, or when 150 days have run from entry in the civil docket."

Dismissal and Mandate filed on March 6, 2007 by retired Senior Circuit Judges Reavely and Circuit Judges DeMoss and Benevides to the Clerk of the Court of Appeals. On March 27, 2007, a Deputy Clerk of the Court of Appeals, addressed a letter to Petitioner stating that:

> We will take no action on your motion to vacate construed as a rehearing. The time for filing a petition for rehearing under Fed. R. App. P. 40 has expired.

Petitioner immediately prepared and on April 9, 2007 mailed a Motion addressed to the Court of Appeals to require the Clerk to file Petitioner's Motion for Rehearing titled: Motion to Vacate the Opinions and Order of Dismissal filed on March 6, 2007 out of time.[19] On April 11, 2007, in a letter addressed to Petitioner, a Deputy Clerk stated that: "The court has granted the Appellant's motion to file a petition for rehearing out of time in this case." Shortly thereafter, on May 1, 2007, retired Senior Circuit Judge Reavely "entered for the Court" the following Order:

> IT IS ORDERED that the "motion to vacate the judgment rendered by Circuit Judges Reavely, DeMoss, and Benavides dated, filed and issued as a mandate on March 6, 2007 dismissing the appeal as untimely" treated as a petition for rehearing is denied.

(App. 7).

COLLATERAL CONSEQUENCES

As a consequence of the void Judgment due to lack of Subject Matter Jurisdiction entered by Judge Prado on May 28, 1997, Petitioner has been stigmatized and

---

[19] Fed. R. App. Proc. Rule 47(a)(2): "A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

branded with the scarlet letters of "bankruptcy fraud." The indelible consequences immediately generated by the void Judgment resulted in loss of Petitioner's licenses to practice law in the Supreme Court and all the lower Courts of the State of Texas and in the United States Tax Court, the United States District Court, Western District of Texas, the United States Court of Appeals, Fifth Circuit, and in the Supreme Court, including loss of membership in the State Bar of Texas, the American and San Antonio Bar Association and the American and Texas College of Probate and Estate Counsel, culminating in the extinguishment of a previously unblemished 48 year productive professional career. As a further consequence of the loss of income resulting from the parallel loss of Petitioner's licenses to practice Law, Petitioner is unable to employ the services of an attorney and the Constitutional guarantee of the Sixth Amendment that Petitioner "shall have the Assistance of Counsel for his defense" is meaningless.

Petitioner has been unable to obtain gainful employment since release from Prison at a compensation level greater than the minimum wage in any occupation other than menial labor, his application for employment being uniformly and consistently rejected because of the mandated disclosure of the bankruptcy proceedings in conjunction with the criminal proceedings. Moreover, due to the Order for Restitution mentioned below, Petitioner has been consistently and continuously denied credit in anticipation of purchasing a residence, a car, medical and dental services and personal items such as clothing. Petitioner has been forced to survive on a "cash paid in advance basis" within the limits provided by his Social Security entitlements which provides a monthly income substantially below the Federal poverty level.

In the void Judgment entered on May 28, 1997, Judge Prado ordered payment of $185,000 restitution to the

bankruptcy trustee (App. 18) who had previously collected $218,347 during the course of the bankruptcy proceedings prior to the initiation of criminal proceedings by AUSA Mathews on March 28, 1995, all of which – 100% – yes, the entire $218,347 cash collected, net of expenses, was with the approval of the bankruptcy court, applied to the payment of attorney's fees claimed by the bankruptcy trustee and his solely owned alter ego corporate law firm and his associated attorney,[20] none of which was paid to any creditor or claimant in the bankruptcy proceedings. (App. 18, Par 42-46).

The $185,000 double-dip restitution ordered by Judge Prado in his May 28, 1997 Judgment for the benefit of the already over-compensated bankruptcy trustee can only be characterized as outrageous. All of Petitioner's creditors and claimants in the bankruptcy proceedings were paid, satisfied and their claims discharged by Petitioner acting independently of the bankruptcy trustee and without order, judgment or decree of the bankruptcy judge, prior to the inception of the criminal proceedings. The bankruptcy trustee paid nothing – zero – to either of Petitioner's secured creditors and nothing – zero – no, not one single penny was ever paid by the bankruptcy trustee to any "general unsecured creditors" or claimant in the bankruptcy proceedings. (App. 18, Par. 36-46). The $2,438,733.10 claim filed by the Estate of Booney Moore, deceased, which precipitated the bankruptcy proceedings was neither

---

[20] It is universally recognized that bankruptcy estates should not be consumed by the fees and expenses of court appointed professionals. *In re: Consolidated Bancshares*, 785 F.2d 1249, 1255 (5th Cir. 1986); *Matter of Taxman Clothing Co.*, 49 F.3d 310, 314, 316 (7th Cir. 1995); *In re: Toney*, 171 B.R. 414, 415 (Bkr. S.D. Fla. 1994); *In re: Arnold*, 176 B.R. 13 (Bkr. E.D. Tex. 1995); *In re: Witts*, 1995 WL 153017 (Bkr. E.D. Tex. 1995).

allowed nor approved by the bankruptcy court but was extinguished and the claim dismissed as moot when the judgment was reversed and a Take Nothing Judgment rendered by the Fourth Court of Appeals, San Antonio, Texas, on October 31, 1991 [21]

ARGUMENT AMPLIFYING REASONS FOR GRANTING THE WRIT

Petitioner timely served a copy of Petitioner's Opening Brief and each of the Motions to Disqualify Judge Prado, the Motion to Vacate the Opinions of the Circuit Court Judges named above and the supplemental Motion for Acquittal on the United States Attorney by United States First Class Mail Certified RRR. Neither AUSA Mathews nor any other United States Attorney filed a Reply Brief or any other pleading authorized or required by the Fed. Rules of Procedure to the allegations of fact and of law set forth in Petitioner's Opening Brief or to either of the Motions mentioned above.

By failure of the United States Attorney (AUSA Larry Mathews in the Trial Court) to appear and offer evidence and proof of Subject Matter Jurisdiction in this Case in the Trial Court or in the Court of Appeals, coupled with the failure of the United States Attorney (AUSA Joseph Gay in the Court of Appeals) to file a Response as required by Fed. R. Civ. Proc. Rule 8(d) or any other pleading authorized or required by Law or the Federal Rules of Procedure, the United States admitted the Lack of Subject Matter Jurisdiction and Constitutional Violations alleged in Petitioner's

---

[21] *Coble Wall Trust Co. v. Palmer*, 848 S.W.2d 696 (Tex. App. San Antonio 1991) *writ granted, rev'd and remanded*, 851 S.W.2d 178 (Tex. 1992), *on remand*, 859 S.W.2d 475 (Tex. App. San Antonio 1993), *writ denied*.

March 25, 2005 Motion to Vacate and Set Aside the Judgment for Lack of Subject Matter Jurisdiction Motion and Constitutional Violations. For the same reasons, the disqualification of Judge Prado and Circuit Judges Jolly, Jones, Stewart, Higginbotham, Weiner, and Barksdale is therefore admitted by the United States Attorneys and stands unopposed by the United States in the Court of Appeals, Fifth Circuit.

Neither AUSA Mathews nor any other Attorney appearing on behalf of the United States asked Judge Biery to dismiss Petitioner's Motion to Vacate and Set Aside the void[22] Judgment dated May 28, 1997 for lack of Subject Matter Jurisdiction and violations of 28 U.S.C. § 455(a) and (b)(1) and (3) and the Due Processes of Law as set forth in the Fifth and Sixth Amendments to the Constitution. Judge Biery acted spontaneously without Notice or a Hearing and without an opportunity afforded Petitioner to present arguments and authorities in support of Petitioner's Motion to Vacate and Set Aside the void Judgment dated May 28, 1997 for lack of Subject Matter Jurisdiction.

The function of a United States District Judge is limited to adjudication of a controversy between two or more litigants. In the situation, as in this Case, where the United States, acting by and through its Attorney of Record, does not contest and by default admits the contentions of Petitioner, there is no controversy regarding the failure of the Indictment to allege an Offense Against the

---

[22] *United States v. Indoor Cultivation Equipment etc.*, 55 F.3d 1311 (7th Cir. 1995) (A judgment is void "if the court that rendered it lacked jurisdiction of the subject matter . . . "; *Brazosport Towing Co. v. 3,838 Tons of Sorghum*, 607 F. Supp. 11 (S.D. Tex. 1984) (A void judgment is "a legal nullity and a court considering a motion to vacate has no discretion in determining whether it should be set aside.").

United States with the consequent failure of Subject Matter Jurisdiction. Since there is no justicable controversy, Judge Biery does not enjoy a judicial mandate to intervene in the affairs of the litigants in favor of one litigant or the other. Under these circumstances, the District Judge is precluded from *sua sponte* exceeding the boundaries of Subject Matter Jurisdiction and Due Process of the Law by adopting the functions of an inquisitor, prosecutor, fact-finder, adjudicator and enforcer of the accusations of the Grand Jury according to the concepts and perceived standards of conduct envisioned by the Judge's unilateral interpretation of the applicable facts and the appropriate Rules of Law. To hold otherwise is to advance the jurisdiction and power of a United States District Judge to tyranny.

The Clerk of the Court of Appeals serves as intermediary between Petitioner, a freeborn citizen of the United States, and the Judiciary established by Article III of the Constitution. Clearly, the arbitrary and capricious actions of the Clerk in refusing to file Petitioner's Opening Brief and Motions to Disqualify Judge Prado and other Circuit Judges and Petitioner's supplemental Motion to Vacate the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction exceeds the prerogatives of his Office and violates the most elementary application of the Due Process clause of the Fifth Amendment to the Constitution.

The perceived procedural requirements relied upon by Judge Prado and Judge Biery in the District Court and by Circuit Judges Jolly, Jones, Stewart, Higginbotham, Weiner, and Barksdale in the Court of Appeals in order to avoid adjudication of Petitioner's Motion to Vacate and Set Aside the Judgment entered on May 28, 1997 for Lack of Subject Matter Jurisdiction are clearly subordinate to the indisputable documentary evidence of lack of Subject

Matter Jurisdiction and disqualification of Judge Prado and other Circuit Judges named above.

Moreover, the cancer initiated in the District Court by Judge Prado's disregard of 28 U.S.C. § 47 and § 455(a) and (b)(1) and (3) and the Rules of Law established by the Supreme Court in *Moran v. Dillingham, Rexford v. Brunswick-Baker-Collender Co.*, and *Delaney v. United States* has permeated the Opinions and Judgments of the Court of Appeals and engulfed retired Senior Circuit Judge Reavely, and collaterally, Circuit Judges DeMoss and Benevides, by the Panel's disregard of 28 U.S.C. § 294(b).

Both Judge Prado and Judge Biery have so far departed from the accepted and usual course of judicial proceedings as to deny Petitioner's right to a fair trial under Due Process of Law guaranteed by the Fifth Amendment and the right to a Jury Trial guaranteed by the Sixth Amendment to the Constitution. The exceptional circumstances described above warrant the exercise of the discretionary powers of the Court authorized by the All Writs Act codified in 28 U.S.C. § 1651. Adequate relief cannot be obtained in any other form or from any court other than the Supreme Court.

The need for unblemished integrity of the Judiciary demands parallel accountability for the exercise of Constitutional responsibility vested in the United States District Courts and the United States Court of Appeals, Fifth Circuit, by Article III of the Constitution.

> Now the relevant facts are what they are regardless of what we may happen to believe about them, and regardless of what we may wish them to be. This is indeed the essence and defining character of factuality, of being real: the properties of reality, and accordingly the truths about its properties, are what they are, independent of any

> direct or intermediate control by our will. We cannot alter the facts nor, similarly, the truth about the facts, merely by an exercise of the judgment or by an impulse of desire. Insofar as we know the truth we are in a position to be guided authoritatively in our conduct by the character of reality itself. The facts – the true nature of reality – are the final and incontrovertible recourse of inquiry. They dictate and support an ultimately decisive resolution and rebuttal of all uncertainties and doubts.

On Truth (pp. 54-55) by Harry A. Frankfurt, published by Alford A. Knopf, 2006.

PRAYER FOR RELIEF

Wherefore, premises considered, Petitioner moves the Supreme Court to grant a Writ of Mandamus addressed to Judge Biery to Vacate and Set Aside the Judgment entered on May 28, 1997 by Judge Prado for Lack of Subject Matter Jurisdiction with Instructions for Entry of a Judgment of Acquittal.

In the alternative, Petitioner moves the Supreme Court to grant a Writ of Mandamus or a Writ of Prohibition or both as may be appropriate, request the submission of a Brief or Memoranda of Authorities on any matter requiring additional information, arguments and/or authorities and in the further alternative, grant a common law Writ of Certiorari addressed to the United States Court of Appeals, Fifth Circuit, and thereupon consider and decide the entire matter on its own motion.

Respectfully submitted,

ELWOOD CLUCK,
Petitioner

No. _____

In The
Supreme Court of the United States

IN RE

ELWOOD CLUCK,

Petitioner.

**On Petition For A Writ Of Mandamus
Or A Writ Of Prohibition Or Both
To The United States Court Of Appeals
For The Fifth Circuit**

APPENDIX TO PETITION FOR A WRIT OF MANDAMUS OR A WRIT OF PROHIBITION OR BOTH

THE APPENDIX

Appendix Number — Page Number

1. Order signed and entered by United States District Judge Fred Biery on April 6, 2005 (Docket Entry No. 345) denying Petitioner's Motion to Vacate and Set Aside the Judgment signed and entered on May 28, 1997 by United States District Judge Edward C. Prado for Lack of Subject Matter Jurisdiction and Constitutional Violations .....App. Pg. 1

2. Order signed and entered by Judge Fred Biery on May 16, 2005 (Docket Entry No. 349) denying:

   a. Petitioner's Motion to Reconsider the Order of the Court dated June 6, 2005 denying Petitioner's Motion to Vacate and Set Aside the Judgment dated, May 27, 1997 for Lack of Subject Matter Jurisdiction and Constitutional Violations

   b. Petitioner's May 3, 2005 Request for an Evidentiary Hearing and Recommendations for Conclusions of Law (Docket Entry No. 348).....App. Pg. 4

3. Order signed and entered by Judge Fred Biery on June 9, 2005 (Docket Entry No. 349) denying:

   a. Petitioner's Request for Findings of Fact and Conclusions of Law and Request for Judicial Notice of Adjudicative Facts dated and filed on March 24, 2005 (Docket Entry No. 350)

THE APPENDIX – Continued

Appendix Number		Page Number
	b. Petitioner's Motion for Entry of Judgment of Acquittal (Docket Entry No. 352) pursuant to Fed. R. Crim. Proc. Rule 29, Fed. R. Crim. Proc. Rule 12(b)(2), the first sentence of Fed. R. Crim. Proc. Rule 34 and Fed. R. Civ. Proc. Rule 60(b)(4) After Notice to Plaintiff dated and filed on June 6, 2005	App. Pg. 5
4.	Order signed and entered by Judge Fred Biery on August 31, 2005 (Docket Entry No. 359) denying Petitioner's Notice of Appeal	App. Pg. 6
5.	Order signed and entered by Judge Fred Biery on October 14, 2005 (Docket Entry No. 369) denying Petitioner's Supplemental Notice of Appeal	App. Pg. 8
6.	Opinion and Order of Dismissal entered March 6, 2007 by Senior Circuit Judge Reavely and Circuit Judges DeMoss and Benevides in Docket No. 05-51171, United States Court of Appeals, Fifth Circuit, dismissing Petitioner's Appeal as untimely	App. Pg. 10
7.	Order entered May 1, 2007 by retired Senior Circuit Judge Reavely in Docket No. 05-51171, United States Court of Appeals, Fifth Circuit, denying Petitioner's Motion for Rehearing	App. Pg. 12

THE APPENDIX – Continued

Appendix Number		Page Number
8.	The Judgment signed and entered by United States District Judge Edward C. Prado on May 28, 1997 in United States of America, Plaintiff, vs. Elwood "Jack" Cluck, Defendant, Docket No. SA-95-CR-99-EP, United States District Court, Western District of Texas, San Antonio Division	App. Pg. 13
9.	Order and Judgment signed and entered by Judge Edward C. Prado on July 25, 2000 dismissing Petitioner's 28 U.S.C. Sec. 2255 Motion to Vacate and Set Aside the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction and Constitutional Violations	App. Pg. 20
10.	Order and Judgment signed and entered by Judge Edward C. Prado on September 25, 2000 dismissing Petitioner's Motion for Reconsideration of Petitioner's 28 U.S.C. Sec. 2255 Motion to Vacate and Set Aside the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction and Constitutional Violations	App. Pg. 24
10a.	Order signed and entered by Judge Edward C. Prado on November 3, 2000 denying Petitioner's Motion to Reconsider the Court's Order of September 25, 2000	App. Pg. 30
11.	Order signed and entered by Judge Edward C. Prado on December 14, 2000 dismissing Petitioner's Motion for Findings of Fact and Conclusions of Law	App. Pg. 31
12.	Opinion and Order entered April 3, 2001 by Circuit Judges Higginbotham, Weiner and Barksdale in Docket No. 00-50952, United States Court of Appeals, Fifth Circuit	App. Pg. 32

THE APPENDIX – Continued

Appendix Number		Page Number
13.	Order signed and entered by Judge Edward C. Prado on May 24, 2001 re-entering Judge Prado's Order dated September 25, 2000 dismissing Petitioner's Motion for Reconsideration of Petitioner's 28 U.S.C. Sec. 2255 Motion to Vacate and Set Aside the May 28, 1997 Judgment for Lack of Subject Matter Jurisdiction and Constitutional Violations.....	App. Pg. 35
14.	Order signed and entered by Judge Edward C. Prado on June 12, 2001 dismissing Petitioner's Motion for a supplemental Certificate of Appealability	App. Pg. 37
15.	Opinion and Order entered October 5, 2001 by Circuit Judges Higginbotham, Weiner and Barksdale in Docket No. 00-50952, United States Court of Appeals, Fifth Circuit.....	App. Pg. 39
16.	Opinion entered December 5, 2001 by Circuit Judges Higginbotham, Weiner and Barksdale in Docket No. 00-50952, United States Court of Appeals, Fifth Circuit, dismissing Petitioner's Motion to Recall the Mandate	App. Pg. 43
17.	The Indictment dated and filed March 27, 1995 in United States of America, Plaintiff vs. Elwood "Jack" Cluck, Defendant, Docket No. SA-95-CR-99-EP/FB in the United States District Court, Western District of Texas, San Antonio Division	App. Pg. 45
18.	Petitioner's Affidavit in Support of Petitioner's Motion to Disqualify Appellate Court Judges mailed to Mr. Charles R. Fulbruge III, Clerk of the United States Court of Appeals, Fifth Circuit on January 12, 2006	App. Pg. 55

THE APPENDIX – Continued

Appendix Number		Page Number
19.	Article III, Section 2, cl. 1, of the Constitution	App. Pg. 122
20.	The Fifth Amendment to the Constitution	App. Pg. 122
21.	The Sixth Amendment to the Constitution	App. Pg. 123
22.	18 U.S.C. Sec. 152	App. Pg. 124
23.	18 U.S.C. Sec. 201(c)(2)	App. Pg. 126
23a.	18 U.S.C. Sec. 3231	App. Pg. 127
24.	18 U.S.C. Sec. 3282	App. Pg. 128
25.	28 U.S.C. Sec. 47	App. Pg. 129
26.	28 U.S.C. Sec. 294	App. Pg. 130
27.	28 U.S.C. Sec. 455	App. Pg. 132
28.	28 U.S.C. Sec. 1291	App. Pg. 136
29.	28 U.S.C. Sec. 1651	App. Pg. 137
30.	28 U.S.C. Sec. 1746	App. Pg. 138
21.	28 U.S.C. Sec. 2253	App. Pg. 139
32.	28 U.S.C. Sec. 2255	App. Pg. 140

APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

UNITED STATES of AMERICA	§	
Plaintiff-Respondent	§	
	§	**Criminal Case**
v.	§	**No. SA-95-CR-99-FB**
ELWOOD "JACK" CLUCK,	§	
	§	
Defendant-Movant	§	

ORDER

(Filed Apr. 6, 2005)

Before the Court is Defendant Elwood "Jack" Cluck's Motion for Authorization to File Motion to Vacate (Docket Entry # 342) and Motion to Vacate Judgment for Lack of Jurisdiction and Constitutional Violations (Docket Entry # 343).

Defendant Cluck's Motion to Vacate challenges his 1997 bankruptcy fraud conviction contending: the indictment failed to properly allege offenses and the evidence was insufficient to prove offenses pursuant to 18 U.S.C. § 152; and relying on *Blakely v. Washington,* ___ U.S. ___, 124 S. Ct. 2531, 2537, 159 L. Ed. 2d 403 (2004) (holding sentence exceeding statutory maximum based on sentencing judge's additional findings as authorized by Washington statute violated defendant's Sixth Amendment right to jury trial), he argues his sentence violates his Fifth and Sixth Amendment rights.

The record shows Defendant Cluck filed a previous 28 U.S.C. § 2255 Motion to Vacate (Docket Entry # 291) that

was denied on July 25, 2000 (Docket Entries ## 302 & 309). A movant that has had a previous § 2255 motion denied may not proceed with a second or successive § 2255 motion without the authorization of the court of appeals the second or successive motion alleges newly discovered evidence or is based on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court. *See In re Tolliver,* 97 F.3d 89, 90 (5th Cir. 1996). Thus Defendant Cluck may not proceed with the current Motion without an order from the Fifth Circuit authorizing him to proceed. His current filings are not accompanied by such a Fifth Circuit order and thus this Court may not proceed with his Motion. In any event his § 2255 Motion is also barred by the one-year statute of limitations. Therefore Defendant Cluck's § 2255 Motion to Vacate shall be denied.

After completion of a sentence and supervised release a defendant may file a petition for coram nobis challenging his conviction and such a petition does not require leave of the court of appeals. *See generally U.S. v. Esogbue,* 357 F. 3d 532, 534-35 (5th Cir. 2004). A writ of error coram nobis will only issue where the petitioner demonstrates his conviction was riddled with "errors resulting in a complete miscarriage of justice," and the petitioner shows sound reasons for not previously presenting the errors. *Id.* Even if this Court were to liberally construe Defendant Cluck's current Motion as a coram nobis petition, he failed to demonstrate the requisite error or miscarriage of justice. His claim the indictment or evidence were insufficient is conclusory, was previously rejected by this court and the court of appeals, and is without merit. Moreover, his *Blakely* claim is without merit because *Blakely* and the Supreme Court's more recent decision in *US. v. Booker,* ___

U.S. ___, 125 S. Ct. 738, 749-69, ___ L. Ed. 2d ___ (2005) (invalidating parts of the U.S. Sentencing Guidelines enabling statute) *do not apply retroactively. See Green v. U.S.*, 397 F. 3d 101, 103 (2d Cir. 2005); *Humphress v. U.S.*, 398 F. 3d 855, 860-63 (6th Cir. 2005); *McReynolds v. U.S.*, 397 F. 3d 479, 481 (7th Cir. 2005); *Bey v. U.S.*, 399 F. 3d 1266,1268-69 (10th Cir. 2005); *Valera v. U.S.*, 400 F. 3d 864, 868 (11th Cir. 2005). Therefore construing Defendant Cluck's Motion to Vacate as a coram nobis petition, it is without merit and shall be denied.

Accordingly, Defendant Cluck's Motion for Authorization to File Motion to Vacate (Docket Entry # 342) and Motion to Vacate Judgment for Lack of Jurisdiction and Constitutional Violations (Docket Entry # 343) are **DENIED**.

It is so ORDERED.

SIGNED this 6th day of April, 2005.

/s/ Fred Biery
FRED BIERY
UNITED STATES
DISTRICT JUDGE

APPENDIX 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

UNITED STATES of AMERICA	§	
Plaintiff-Respondent	§	
	§	
v.	§	**Criminal Case**
	§	**No. SA-95-CR-99-FB**
ELWOOD "JACK" CLUCK,	§	
	§	
Defendant-Movant	§	

ORDER

(Filed May 16, 2005)

Defendant Elwood "Jack" Cluck's Motion for Reconsideration (Docket Entry # 346) of this Court's Order denying his 28 U.S.C. § 2255 Motion to Vacate is **DENIED**. Defendant failed to identify an error of law or fact or other grounds warranting a new trial pursuant to Fed. R. Civ. P. 59 or relief from judgment pursuant to Fed. R. Civ. P. 60(b). Defendant's Motion for Evidentiary Hearing (Docket Entry # 348) and all other pending motions are **DENIED** as moot.

It is so ORDERED.

SIGNED this 16th day of May, 2005.

/s/ Fred Biery
FRED BIERY
UNITED STATES
DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

UNITED STATES of AMERICA	§	
Plaintiff-Respondent	§	
	§	**Criminal Case**
v.	§	**No. SA-95-CR-99-FB**
ELWOOD "JACK" CLUCK,	§	
	§	
Defendant-Movant	§	

ORDER

(Filed Jun. 10, 2005)

Defendant Elwood "Jack" Cluck's Request for Findings of Fact and Conclusions of Law and Request for Judicial Notice of Adjudicative Facts (Docket Entry # 350), Motions for Entry of Default (Docket Entries ## 352-53), and Motion for Entry of Judgment After Notice to Plaintiff (Docket Entry # 355), seeking reconsideration of this Court's previous orders denying his Motion to Vacate and Set Aside the Judgment for Lack of Subject Matter Jurisdiction and Constitutional Violations, are **DENIED** for the reasons stated in this Court's previous orders (*see* Docket Entries ## 345, 349).

It is so ORDERED.

SIGNED this 9th day of June, 2005.

/s/ Fred Biery
FRED BIERY
UNITED STATES
DISTRICT JUDGE

APPENDIX 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

UNITED STATES of AMERICA	§	
Plaintiff-Respondent	§	
	§	**Criminal Case**
v.	§	**No. SA-95-CR-99-FB**
ELWOOD "JACK" CLUCK,	§	
	§	
Defendant-Movant	§	

ORDER

(Filed Aug. 31, 2005)

Defendant Elwood "Jack" Cluck's Statement of the Proceedings and Evidence in Regard to Motion to Vacate Judgment (Docket Entry # 362) and Statement of the Proceeding and Evidence in Regard to the . . . Judgment (Docket Entry # 363), seeking reconsideration of this Court's previous orders denying his Motion to Vacate and Set Aside the Judgment for Lack of Subject Matter Jurisdiction and Constitutional Violations, are **DENIED**. Defendant failed to identify an error of law or fact or other grounds warranting relief from judgment pursuant to Fed. R. Civ. P. 60(b).

Defendant Cluck's Notice of Appeal (Docket Entry # 359) construed as a motion for a certificate of appealability to appeal this Court's denial of his 28 U.S.C. § 2255 Motion to Vacate is **DENIED** for the reasons stated in this Court's Order denying his Motion to Vacate (Docket Entry # 345). Moreover, his appeal is untimely from this Court's Order denying his Motion to Vacate. *See* Fed. R. App. P.

4(a)(1)(B). Defendant's Motion and appeal fail to make "a substantial showing of the denial of a federal right" as required by Fed. R. App P. 22 for a certificate of appealability. *See Slack v. McDaniel*, 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Furthermore, Defendant's appeal fails to present a "good faith" non-frivolous issue as required by 28 U.S.C. § 1915(a)(3) to proceed in forma pauperis on appeal. *See Coppedge v. U.S.*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962).

It is so ORDERED.

SIGNED this 31st day of August, 2005.

/s/ Fred Biery
FRED BIERY
UNITED STATES
DISTRICT JUDGE

APPENDIX 5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT of TEXAS
SAN ANTONIO DIVISION

UNITED STATES of AMERICA	§	
Plaintiff-Respondent	§	
	§	**Criminal Case**
v.	§	**No. SA-95-CR-99-FB**
ELWOOD "JACK" CLUCK,	§	
	§	
Defendant-Movant	§	

ORDER

(Filed Oct. 14, 2005)

Defendant Elwood "Jack" Cluck's Request for Findings of Fact and Conclusions of Law (Docket Entry # 366) is **DENIED**. Defendant's Supplemental Request for the Record on Appeal (Docket Entry # 367) is **DENIED** as not necessary.

Defendant Cluck's Supplemental Notice of Appeal (Docket Entry # 365) construed as a motion for a certificate of appealability to appeal this Court's Order denying reconsideration of the denial of his Motion to Vacate Judgment is **DENIED** for the reasons stated in this Court's prior Orders (Docket Entries ## 345 & 364). Defendant's Motion and appeal fail to make "a substantial showing of the denial of a federal right" as required by Fed. R. App. P. 22 for a certificate of appealability. *See Slack v. McDaniel,* 529 U.S. 473, 483, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). Furthermore, Defendant's appeal fails to present a "good faith" non-frivolous issue as required by 28 U.S.C. § 1915(a)(3) and therefore Defendant

is **DENIED** leave to proceed in forma pauperis on appeal. *See Coppedge v. U.S.*, 369 U.S. 438, 445, 82 S. Ct. 917, 8 L. Ed.2d 21 (1962).

It is so ORDERED.

SIGNED this 14th day of October, 2005.

/s/ Fred Biery
FRED BIERY
UNITED STATES
DISTRICT JUDGE

APPENDIX 6

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51171
USDC No. 5:95-CR-99

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELWOOD CLUCK, also known as Jack Cluck,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(Filed Mar. 6, 2007)

Before REAVLEY, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

In this successive civil suit brought by a former federal prisoner under 28 U.S.C. § 2255, the district court entered an order on April 7, 2005, denying the motion to vacate the sentence and conviction. In a civil case in which the United States is a party, a notice of appeal, to be timely, must be filed within sixty days after the entry of the order or judgment appealed from. *See* Fed. R. App. P

4(a)(1)(B). Thus, the notice had to be filed on or before June 6, 2005.

The petitioner dated his notice of appeal July 25, 2005, and it was filed in the district court on July 28, 2005. The notice was clearly untimely.

The time limitation for filing a notice of appeal is jurisdictional; therefore, the lack of a timely notice mandates dismissal of the appeal. *Robbins v. Maggio,* 750 F.2d 405, 408 (5th Cir. 1985).

Accordingly, the appeal is DISMISSED.

APPENDIX 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-51171

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ELWOOD CLUCK also known as, Jack Cluck

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas, San Antonio

ON PETITION FOR REHEARING

(Filed May 1, 2007)

Before REAVLEY, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the "motion to vacate the judgement rendered by Circuit Judges Reavely, DeMoss, and Benavides dated, filed, and issued as a mandate on March 6, 2007 dismissing the appeal as untimely" treated as a petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ Thomas Reavley
United States Circuit Judge

APPENDIX 8

UNITED STATES DISTRICT COURT
Western District of Texas
SAN ANTONIO DIVISION

UNITED STATES
OF AMERICA

v.

Case Number SA-95-CR-099(1)

ELWOOD "JACK"
CLUCK

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed May 29, 1997)

The defendant, ELWOOD "JACK" CLUCK, was represented by attorney, Royal K. Griffin.

The defendant has been found not guilty on Count Two (2) and is discharged as to such Count.

The defendant was found guilty on Counts One (1), Three (3), Four (4), Five (5), Six (6), Seven (7) and Eight (8) by a jury verdict on January 16, 1997 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Counts, involving the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
18 U.S.C. § 152	Bankruptcy Fraud	On or abut May 1, 1990	1
18 U.S.C. § 152	Bankruptcy Fraud	On or about June 28, 1991	3

18 U.S.C. § 152	Bankruptcy Fraud	On or about May 1, 1990	4
18 U.S.C. § 152	Bankruptcy Fraud	On or about November 8 and 16, 1990	5 and 6
18 U.S.C. § 152	Bankruptcy Fraud	On or about May 1, 1990 until June 18, 1990	7
18 U.S.C. § 152	Bankruptcy Fraud	On or about May 1, 1990	8

As pronounced on May 22, 1997, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $350.00, ($50.00 on each of Counts 1, 3, 4, 5, 6, 7 and 8), which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid.

Signed this the 28th day of May, 1997.

/s/ Edward C. Prado
EDWARD C. PRADO
United States District Judge

Defendant's SSN: xxx-xx-xxxx
Defendant's Date of Birth:
November 24, 1928
Defendant's address:
7711 Broadway, Apt. 35B,
San Antonio, TX 78209

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Twenty-Four (24) months on each of Counts 1, 3, 4, 5, 6, 7, and 8, to be served concurrently.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years on each of Counts 1, 3, 4, 5, 6, 7 and 8, to run concurrently.

While on supervised release, the defendant shall comply with the standard conditions that have been adopted by this court as set forth in sheet 3a of this judgment; and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the District to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X The defendant shall pay the fine, special assessment, costs of prosecution, or restitution that remains unpaid at the commencement of the term of supervised release on a schedule to be approved by the Court.

X The defendant shall provide the probation officer access to any requested financial information

X The defendant shall not incur new credit charges or open additional lines of credit without approval of the probation officer unless the defendant is in compliance with the payment schedule.

STANDARD CONDITIONS OF SUPERVISIONS

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another federal, state, or local crime during the term of supervision.

2) The defendant shall not illegally possess a controlled substance. Revocation of probation and supervised release is mandatory for possession of a controlled substance.

3) If convicted of a felony offense, the defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

4) The defendant shall not leave the judicial district without the permission of the court or probation officer.

5) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

6) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

7) The defendant shall support his or her dependents and meet other family responsibilities.

8) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

9) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

10) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

11) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

12) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

13) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

14) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

15) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court.

16) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Randolph N. Osherow, Trustee 342 Woodlawn San Antonio, TX 78212 (Case No. 90-50952)	$185,000.00

Payments of restitution are to be made to the Clerk, United States District Court to be transferred to the Payee.

Restitution shall be paid in full immediately.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report. The Court finds the amount of loss in this case, for guideline purpose, to be less than Two Hundred Thousand, but more than One Hundred Twenty Thousand. Therefore, the Court reduces the Total Offense Level by one point. The Court finds the Restitution to be in the amount of $185,000.00.

Guideline Range Determined by the Court:

Total Offense Level:	15
Criminal History Category:	I
Imprisonment Range:	18 months to 24 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$4,000.00 to $40,000.00
Restitution:	$185,000.00

The fine is waived because of the defendant's inability to pay due to the amount of Restitution.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX 9

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
	§	
Plaintiff,	§	Civil Action No.
	§	SA-99-CA-1417-EP
VS.	§	
	§	Crim. Action No.
UNITED STATES OF AMERICA,	§	SA-95-CR-99(1)-EP
	§	
Defendant.	§	

ORDER

(Filed Jul. 25, 2000)

On this date the Court considered the Memorandum and Recommendation of the United States Magistrate Judge, entered June 8, 2000, and the Petitioner's objections to the Magistrate's recommendation, filed June 21, 2000. After careful consideration, the Court will accept the Magistrate's conclusion that this case should be dismissed.

Where no party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court need not conduct a de novo review of it. *See* 28 U.S.C. §636(b)(1) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings and recommendations to which objection is made"). In such cases, the Court need only review the Memorandum and Recommendation and determine whether it is either clearly erroneous or contrary to law. *United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir. 1989). On the other hand, any Memorandum or Recommendation that is objected to requires de novo review by the Court. Such a

review means that the Court will examine the entire record and will make an independent assessment of the law. The Court need not, however, conduct a de novo review when the objections are frivolous, conclusive, or general in nature. *Battle v. United States Parole Commission*, 834 F.2d 419, 421 (5th Cir. 1987).

The Court has conducted the requisite de novo review of this case. The Court agrees with the Magistrate that the current application must be construed as a motion to vacate or set aside a sentence under 28 U.S.C. section 2255.[1] Because Petitioner filed a section 2255 application on May 18, 1998,[2] which was dismissed on its merits, this application is successive.[3] Moreover, the Petitioner has taken his arguments to the United States Court of Appeals

---

[1] The Magistrate rejects the Petitioner's claim that he has filed a writ for coram nobis relief on the grounds that Rule 60(b) of the Federal Rules of Civil Procedure has abolished such relief. The United States Court of Appeals, however, has held that coram nobis relief is still available with respect to criminal convictions. *See United States v. Drobny*, 955 F.2d 990, 996 (5th Cir. 1992); *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973). However such relief is only available when a petitioner is no longer in federal custody. *Correa-Negron*, 473 F.2d at 685. Where a petitioner is still in custody, relief must be sought pursuant to 28 U.S.C. section 2255. *Id.*

[2] This motion was filed as a writ for coram nobis; for the reasons addressed in the footnote above, it must be construed as a section 2255 motion.

[3] Because the Court finds that the May 18 application renders this motion successive, it expressly does not approve or disapprove of the Magistrate's opinion that the Petitioner's writ of habeas corpus, filed in the Southern District of Texas, Corpus Christi Division, does so. *See Pack v. Yusuff*, No. 99-60283, 2000 WL 942919, at *2 (5th Cir. July 10, 2000) (writ of habeas corpus and motion to vacate sentence are separate forms of relief); *Chambers v. United States*, 106 F.3d 472, 475 (2d Cir. 1997) (motion to vacate is not successive to application for writ of habeas corpus).

for the Fifth Circuit, and the arguments have been rejected by that court. Therefore, the Court agrees with the Magistrate that this case should be dismissed.

ACCORDINGLY, it is ORDERED that this case is DISMISSED.

SIGNED and ENTERED this 25th day of July, 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
	§	
Plaintiff,	§	Civil Action No.
VS.	§	SA-99-CA-1417-EP
UNITED STATES OF AMERICA,	§	SA-95-CR-99(1)-EP
	§	
Defendant.	§	

JUDGMENT

(Filed Jul. 25, 2000)

In accordance with this Court's Order of this same date, it is hereby ORDERED, ADJUDGED, and DECREED that the application is DENIED, and this case is DISMISSED.

SIGNED and ENTERED this 25th day of July, 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

APPENDIX 10

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
	§	
Plaintiff,	§	87 95 CR 99
	§	
VS.	§	Civil Action No.
	§	
UNITED STATES OF AMERICA,	§	SA-99-CA-1417-EP
	§	
Defendant.	§	

ORDER

(Filed Sep. 25, 2000)

On this date the Court considered the Petitioner's motions for reconsideration, for findings of fact and conclusions of law, and for a certificate of appealability. After careful consideration, the Court will grant the motion for reconsideration, in part. However, the Court will again deny the underlying motion to vacate and will also deny the motions for findings and for a certificate of appealability.

On July 25, 2000, this Court dismissed Petitioner's 28 U.S.C. section 2255 motion to vacate and set aside his conviction, judgment, and sentence, concluding that the motion was successive and thus could not be filed without authorization by the United States Court of Appeals for the Fifth Circuit. *See* 28 U.S.C. § 2244(b)(3)(A) (a second or successive section 2255 motion may not be filed until authorized by a panel of the appropriate court of appeals). The Court now concludes that the determination that this motion was successive was erroneous.

A second section 2255 motion is successive if it (1) raises a claim challenging the movant's conviction or sentence that was or could have been raised in an earlier petition or (2) otherwise constitutes an abuse of the writ. *United States v. Orozco-Ramirez,* 211 F.3d 862, 867 (5th Cir. 2000). A motion is not successive if the prior motions were denied on purely procedural grounds. In his motion for reconsideration of the Court's Order, Petitioner argues that his May 18, 1998, application for writ of coram nobis, which this Court denied and has now construed as a motion to vacate, was denied for procedural reasons and therefore cannot be the basis for a finding that the current section 2255 motion is successive.

The difficulty in deciding this question arises from the admittedly ambiguous order issued by the Court in denying Petitioner's May 18, 1998, application for a writ of coram nobis as to Count IV of his indictment. The Court denied that motion "after considering the motion, and the file of this cause." *See Court Order*, July 8, 1998. The Court did not, in its July 8 Order, as it had in its May 1, 1998, Order dismissing other applications for relief, suggest that the dismissal was without prejudice to refiling. The quoted language comes directly from 28 U.S.C. section 2255, which states that a court may deny a motion to vacate on the record and without a hearing, if the record clearly reflects that the motion is not meritorious. A dismissal of a section 2255 motion made "after considering the motion, and the file" is a dismissal on the merits, even though no evidentiary hearing was held. *See Sanders v. United States*, 373 U.S. 1, 16 (1963); *United States v. Kearney*, 682 P.2d 214, 221 (D.C. Cir. 1982).

However, the Petitioner suggests that the Court did not have jurisdiction to dismiss the May 18 application on

its merits. This suggestion is correct. The Fifth Circuit has held that a district court may not decide a section 2255 motion on its merits while a direct appeal is pending. *See Jones v. United States,* 453 F.2d 351, 352 (5th Cir. 1972). When the Fifth Circuit affirmed the July 8, 1999, Order, it did so specifically because of this want of jurisdiction. *See United States v. Cluck,* No. 98-50440 and 98-50682 (July 27, 1998).

It is true that Petitioner filed two additional applications for writs of coram nobis with this Court on July 24 and July 28, 1998, which also sought as partial relief the vacating of Petitioner's sentence. On August 11, 1998, *after* the denial of Petitioner's direct appeal by the Fifth Circuit, this Court denied those motions, apparently on their merits. *See Court Order,* August 11, 1998. Thus, this Court might conceivably find that, even if the May 18 motion could not have been decided on its merits, there was nothing to prevent the Court from denying the July 24 and 28 applications on their merits, with prejudice, because the Petitioner's appeal had been decided against him. This Court might also then conclude that the issues Petitioner now raises could have been raised in those motions and thus find that this petition is successive. *Orozco-Ramirez,* 211 F.3d at 867. However, such a result, in the Court's view, would not be fair. In its May 1, 1998, Order denying Petitioner relief on questions that are substantially similar to those presented here, the Court stated that those claims were dismissed subject to reurging because of the pending of the Petitioner's appeal. The Court will not now fault the Petitioner for failing to raise the issues in another pre-appeal application.

In addition, the Court disagrees with the Magistrate's conclusion that this motion is successive to a federal

habeas action filed in the United States District Court for the Southern District of Texas. *See* Docket No. C-99-CV-277. That action was filed pursuant to 28 U.S.C. section 2241 and sought relief from an alleged wrongful detention. The case has been treated as a habeas corpus case by the court hearing it and has been dismissed without prejudice on a finding that the Petitioner failed to exhaust his administrative remedies. Habeas relief and relief under 28 U.S.C. section 2255 are separate and distinct. *See Kinder v. Purdy,* 222 F.3d 209, 212 (5th Cir. 2000) (distinguishing causes of action). Thus, the Corpus Christi claim does not bar the instant section 2255 motion. *See Chambers v. United States*, 206 F.3d 472, 475 (2d Cir. 1997).

However, the Court agrees with the Government that the issues raised in the current motion either were raised in Petitioner's direct appeal or could have been raised in that appeal. That appeal centered on three basic issues: the adequacy the indictment, the fairness of the restitution order, and the sufficiency of the evidence against the Petitioner. The issues raised in the current motion are the adequacy of the indictment and the fairness of the restitution order. To the extent that the issues here are not *identical* to those raised at the Fifth Circuit, the Petitioner has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors. *See United States v. Placente,* 81 F.3d 555, (5th Cir. 1996). Therefore the Court cannot reach the merits of the Petitioner's motion and will again deny the section 2255 motion. It follows, then, that the Petitioner's request that the Court enter his requested findings will also be denied. Remaining for the Court's determination is whether a certificate of appealability (COA) is warranted.

When reviewing a request for a COA, a court is required to determine whether the petitioner has made a "substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). To make such a showing, the petitioner must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different matter or that the issues presented were adequate to deserve encouragement to proceed further." *Barrientes v. Johnson,* No. 9840348, 2000 WL 1099389, at *27 (5th Cir. Aug. 7, 2000).

Where a petition has been dismissed on procedural grounds, as in this case, a court must determine whether the petitioner has shown that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel,* 120 S.Ct. 1595, 1604 (2000). A court may find that it can first resolve the issue "whose answer is more apparent from the record and arguments" and grant or deny the application on that basis. *Id.* The Court concludes here that there is a clear bar to its consideration of this case on the merits, over which reasonable jurists would not disagree, and on that basis the Court denies the application for a COA. Further, having examined the substantive issues raised in the Petitioner's motion for reconsideration, the Court is persuaded that he has not made a substantial showing of the denial of a constitutional right.

ACCORDINGLY, it is ORDERED that the motion for reconsideration (Docket No. 312) is GRANTED, in PART, as discussed in this Order. The section 2255 motion is again DENIED, and the motions asking the Court to make

findings of fact and conclusions of law and requesting a certificate of appealability (Docket Nos. 313 and 314) are DENIED.

SIGNED and ENTERED this 25th day of Sept., 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

APPENDIX 10a

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
Plaintiff,	§	Criminal Action
	§	SA 95 CR 99 EP
VS.	§	Civil Action No.
UNITED STATES OF AMERICA,	§	SA-99-CA-1417-EP
Defendant.	§	

ORDER

(Filed Nov. 3, 2000)

On this date the Court considered Petitioner's motion to reconsider this Court's September 25, 2000, Order denying Petitioner's motion to vacate and set aside his conviction. After careful consideration, the Court sees no grounds for reconsideration of that Order. The motion is therefore DENIED.

IT IS SO ORDERED.

SIGNED and ENTERED this 3rd day of Nov., 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

APPENDIX 11

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
	§	
Plaintiff,	§	Civil Action No.
	§	SA-99-CA-1417-EP
VS.	§	Criminal Action No.
	§	
UNITED STATES OF AMERICA,	§	SA-95-CR-99(1)-EP
	§	
Defendant.	§	

ORDER

(Filed Dec. 14, 2000)

On this date the Court considered Petitioner's various motions that this Court enter findings of fact and conclusions of law and that this Court rule on those motions expeditiously. The Court, having reviewed the record and its Orders, concludes that it has made sufficient findings to support its conclusion that the Petitioner's section 2255 request that his sentence be vacated or that he be granted a new trial is barred on procedural grounds, as it raises issues that were or could have been raised on direct appeal. Thus, the Court DENIES the relief requested (Docket Nos. 313 and 320-23).

IT IS SO ORDERED.

SIGNED and ENTERED this 14th day of Dec., 2000.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

APPENDIX 12

IN THE UNITED STATES DISTRICT COURT
FOR THE FIFTH CIRCUIT

No. 00-50952
USDC No. SA-99-CV-1417
USDC No. SA-95-CR-99-ALL EP

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELWOOD CLUCK, also known as
Jack Cluck

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(Filed Apr. 3, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

Elwood Cluck appeals the district court's dismissal of his 28 U.S.C. § 2255 motion and the district court's subsequent denial of his second motion for reconsideration. This court has a duty, *sua sponte* if necessary, to determine whether it has appellate jurisdiction. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987).

Initially, the district court dismissed Cluck's 28 U.S.C. § 2255 motion as successive. Cluck filed his first motion for reconsideration, which we construe as a Fed. R. Civ. P. 60(b) motion. *See Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). After Cluck filed his notice of appeal from the court's initial dismissal, the district court granted in part Cluck's first motion for reconsideration, reversing its decision that the motion was successive and determining that Cluck was procedurally barred from the raising claims that either had been raised on direct appeal or could have been raised on appeal.

Although we have jurisdiction over Cluck's timely notice of appeal from the district court's initial judgment dismissing his 28 U.S.C. § 2255 motion as successive, the appeal from the district court's denial of the second motion for reconsideration is a nullity because the district court was without jurisdiction to issue its two postjudgment orders. *See Winchester v. United States Atty. for Southern Dist. of Texas*, 68 F.3d 947, 948-49 (5th Cir. 1995).

Following the procedure established in *Willie v. Continental Oil Co.*, 746 F.2d 1041, 1046 (5th Cir. 1984), *vacated*, 760 F.2d 87 (5th Or. 1985), *rev'd on other grounds*, 784 F.2d 706 (5th Cir. 1986) (en banc), we construe the district court's partial grant of postjudgment relief as a request for leave from this court to grant such relief, which we GRANT. The case is REMANDED to the district court for the reentry of its order previously entered on September 27, 2000. Upon such entry of the order and the filing of a notice of appeal from the newly entered judgment, the clerk of this court shall consolidate the appeals.

Cluck's motions for a certificate of appealability (COA), leave to file supplemental brief in support of COA,

and leave to dispense with filing fee are HELD IN ABEYANCE.

APPENDIX 13

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
	§	
Movant,	§	Civil Action No.
	§	SA-99-CA-1417-EP
VS.	§	(Criminal Action No.
	§	
UNITED STATES OF AMERICA,	§	SA-95-CR-99(1)-EP)
	§	
Respondent.	§	

ORDER

(Filed May 24, 2001)

Previously, the movant in the above numbered and styled cause appealed this Court's order dismissing his motion to set aside sentence and denying of his second motion for reconsideration. Subsequently, the United States Court of Appeals for the Fifth Circuit determined that because this Court did not have jurisdiction to issue two post-judgment orders, the order denying the movant's second motion for reconsideration was a nullity. Consequently, the Court of Appeals remanded this cause and directed this Court to re-enter the order it entered on September 25, 2000.

Since that time, the movant filed a motion wherein he asked this Court to vacate his sentence in his criminal cause. This Court's jurisdiction, however, is limited to the scope of the remand. *U.S. v. Becerra*, 155 F.3d 740, 753 (5th Cir. 1998). The Court of Appeals was explicit in what must be done in this case. This Court will act accordingly. Therefore, the movant's Motion for Entry of Judgment

(docket entry #327) is DENIED and the Court's order dated September 25, 2000 is RE-ENTERED.

SIGNED and ENTERED this 24th day of May, 2001.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

APPENDIX 14

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

ELWOOD "JACK" CLUCK,	§	
	§	
Movant,	§	Civil Action No.
	§	SA-99-CA-1417-EP
VS.	§	(Criminal Action No.
	§	
UNITED STATES OF AMERICA,	§	SA-95-CR-99(1)-EP)
	§	
Respondent.	§	

ORDER

(Filed Jun. 12, 2001)

On May 24, 2001, this Court complied with an order by the United States Court of Appeals for the Fifth Circuit and re-entered its order dated September 25, 2000. Since that time, the petitioner filed a motion asking this Court to enter findings of fact and conclusions of law in respect to that action. Therein, the petitioner enumerated numerous findings of fact and conclusions of law that he wanted this Court to enter. The petitioner also filed a motion asking for a supplemental certificate of appealability. Therein, the petitioner reiterated his earlier arguments about why he believes he is entitled to a certificate of appealability. The petitioner filed another motion asking the Court to rule on his motion for findings of fact.

The Court's order dated May 24, 2001 explained why the Court's earlier order was re-entered. As a result, the Court need not enter findings of fact and conclusions of law. Accordingly, the Court GRANTS the petitioner's

motion for a ruling (docket entry #333) and DENIES the motion for findings of fact (docket entry #332).

The Court's order dated September 25, 2000, explained the Court's reasons for denying the petitioner's motion for a certificate of appealability. Those reasons also apply to the petitioner's request for a supplemental certificate of appealability. For the reasons set forth in the September 25, 2000 order, the petitioner has not made a substantial showing of the denial of a constitutional right. As a result, the Court's [sic] DENIES the petitioner's request for a supplemental certificate of appealability (docket entry #334).

SIGNED and ENTERED this 12th day of June, 2001.

/s/ Edward C. Prado
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

APPENDIX 15

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50952 c/w No. 01-50581
USDC No. SA-99-CV-1417 c/w/
USDC No. SA-95-CR-99-ALL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELWOOD CLUCK, also known as Jack Cluck,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(Filed Oct. 5, 2001)

ORDER:

Defendant-Appellant Elwood Cluck, federal prisoner # 68640-080, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2255 motion. On remand from this court, the district court reentered its order in which it granted, in part, Cluck's motion for reconsideration of its dismissal of the motion as successive. That court dismissed Cluck's motion on other grounds, however, holding that he was procedurally barred from raising the issues of adequacy of the indictment and

fairness of the restitution order in the instant motion. These issues either had been raised in Cluck's direct appeal or could have been, and Chick has failed to demonstrate (1) cause for his failure to raise these issues on appeal and (2) actual prejudice stemming from the alleged errors.

Cluck's motion filed on January 19, 2001 for leave to file a supplemental COA motion is GRANTED, His motion for a supplemental COA, filed June 27, 2001, is DENIED. His motions to supplement the record with copies of the indictment and to dispense with the filing and docketing fees in case No. 01-50581 are DENIED as UNNECESSARY.

To obtain a COA, a prisoner must make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "[A]n applicant makes a substantial showing [of the denial of a constitutional right] when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). If the district court has dismissed a § 2255 motion on procedural grounds without reaching the merits of the claims, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

Cluck alleges that there are numerous deficiencies in his indictment which, he contends, deprived the trial court of its jurisdiction. He argues that he may challenge the indictment and the trial court's jurisdiction at any time, including for the first time in a § 2255 motion, without having to show cause and prejudice. Cluck also asserts that the government did not raise procedural bar in the district court.

Cluck is correct that a claim that an indictment is so deficient as to deprive the convicting court of jurisdiction presents an issue that is cognizable under a 28 U.S.C. § 2255 motion. *United States v. Prince*, 868 F.2d 1379, 1383 (5th Cir. 1989). Contrary to Cluck's assertion, however, the government did raise procedural bar in the district court. Cluck is therefore required to demonstrate cause for his procedural default and actual prejudice resulting from the errors. *See United States v. Drobny*, 955 F.2d 990, 994-95 (5th Cir. 1995); *United States v. Shaid*, 937 F.2d 228, 232 (5th Cir. 1991). This cause-and-prejudice test must be met even when a fundamental constitutional error is alleged. *See Murray v. Carrier*, 477 U.S. 478, 493 (1986).

Cluck concedes that he did not raise the issue of jurisdiction on direct appeal, yet he does not challenge the district court's determination that he failed to demonstrate cause and prejudice. As for the other issues that he raised for the first time in his 28 U.S.C. § 2255 motion, Cluck similarly fails to challenge the district court's determination regarding cause and prejudice; neither does he challenge that court's conclusion that several of his issues had been raised and rejected on direct appeal. We will not discuss legal issues that the COA applicant has failed to assert. By failing to challenge the district court's reasons

for holding that review of his claims was procedurally barred, Cluck has abandoned his challenge to this holding. *See Brinkman v. Abner*, 813 F.2d 744, 748 (5th Cir. 1987); *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995). Therefore, he has not made a showing that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *See Hernandez*, 213 F.3d at 248. A COA is DENIED.

Cluck also asks us to vacate his conviction and sentence, pursuant to 29 U.S.C. § 1651, contending that the district court lacked jurisdiction because of the defective indictment. This motion is DENIED. Cluck is still "in custody" for purposes of 28 U.S.C. § 2255, coram nobis is an inappropriate mechanism for challenging his conviction and sentence. *See United States v. Hatten*, 167 F.3d 884, 887 n.6 (5th Cir. 1999); *Ojo v. INS*, 106 F.3d 680, 681 n.2 (5th Cir. 1997).

MOTION FOR COA DENIED; JANUARY 19 MOTION TO FILE SUPPLEMENTAL COA MOTION GRANTED; JUNE 27 MOTION FOR SUPPLEMENTAL COA DENIED; MOTIONS TO SUPPLEMENT THE RECORD AND TO DISPENSE WITH FILING AND DOCKETING FEES IN CASE NO. 01-50581 DENIED AS UNNECESSARY; MOTION TO VACATE CONVICTION AND SENTENCE DENIED.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
UNITED STATES
CIRCUIT JUDGE

APPENDIX 16

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50952
consolidated with
No 01-50581

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ELWOOD CLUCK, also known as Jack Cluck

Defendant-Appellant

Appeals from the United States District Court
for the Western District of Texas, San Antonio

(Filed Dec. 5, 2001)

Before HIGGINBOTHAM, WIENER, and BARKSDALE, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to recall the mandate is DENIED.

A member of this panel previously denied appellant's motion for certificate of appealability and motion to vacate the district court judgment. The panel has considered

appellant's motion for reconsideration. IT IS FURTHER ORDERED that the motion is DENIED.

APPENDIX 17

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

UNITED STATES OF AMERICA Plaintiff v. ELWOOD "JACK" CLUCK Defendant.	CRIMINAL NO. ___ INDICTMENT [COUNTS 1-8; Vio: 18 U.S.C. 152: Bankruptcy Fraud] (Filed March 27, 1995)

THE GRAND JURY CHARGES THAT:

INTRODUCTION

1. The primary purpose of the bankruptcy system is to provide relief for debtors who have become overburdened with debts that are beyond their ability to pay, to grant the debtors a discharge from the debts and to provide a financial "fresh start". The debtor is a person or company that requests relief through bankruptcy. The document the debtor files with the bankruptcy court to request the relief is called a bankruptcy petition. The creditors are those persons or entities that are owed money or have a claim against the debtor. There are different types of relief the debtor may request, reorganization which involves a proposal to pay the debts or a portion of the debts from future earnings, or liquidation where the debtor turns over all his assets to be sold to pay his debts and receives a discharge from his debts. A liquidation type of bankruptcy is known as a Chapter 7

bankruptcy. When the debtor files a petition for relief under Chapter 7 a trustee is appointed who is responsible for locating and collecting the debtor's assets, property, or claims the debtor has against others, collecting or selling the assets for cash and distributing the funds equally to the creditors. The debtor's assets and property is [sic] known as the bankruptcy estate. In order for the trustee to locate and collect the debtor's assets, and in order for the trustee, court and the creditors to properly administer the estate, the debtor is required to prepare, sign and file certain documents with the bankruptcy court which disclose the location and/or value of his financial records, his assets, claims he has against others, who his creditors are, the amount he owes said creditors and his financial transactions over the last year. One of the main documents a debtor who was in business is required to file is known as a "Statement of Financial Affairs For Debtor Engaged in Business" (hereafter referred to as Statement of Financial Affairs). The debtor is required to answer questions about his books and records and financial transactions including all payments he made to his creditors over the 90 days before he filed for bankruptcy and transfers of property he made over the last year. He must also file "Schedules" listing his assets and property, and other schedules listing his debts. The debtor must respond to all questions, list all property and debts and sign these documents as being true and correct under penalty of perjury. The debtor should amend the Statement of Financial Affairs and the Schedules if either he finds a mistake or if circumstances reported on the statement or schedules changes.

2. At all times material to this indictment Defendant **ELWOOD "JACK" CLUCK** was an attorney licensed to

practice law in the State of Texas and the courts of the United States District Court for the Western District of Texas, including the United States Bankruptcy Court for the Western District of Texas.

3. At all times material to the indictment Defendant **ELWOOD "JACK" CLUCK** was engaged in the private practice of law as a sole practitioner.

4. On or about March 30, 1990, Defendant **ELWOOD "JACK" CLUCK** voluntarily filed or caused to be filed a petition requesting relief under Chapter 7 of the Bankruptcy Code.

5. On or about May 1, 1990, Defendant **ELWOOD "JACK" CLUCK** filed or caused to be filed a Statement of Financial Affairs and a set of Schedules, which as to the answers contained in the Statement of Financial Affairs and the Schedules Defendant **ELWOOD "JACK" CLUCK** declared under penalty of perjury were true and correct to the best of his knowledge. On or about May 3, 1990, Defendant **ELWOOD "JACK" CLUCK** under oath at the first meeting of creditors, swore that the Statement of Financial Affairs and the Schedules were true and correct.

COUNT I
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently made a false statement under penalty of perjury within the meaning of Title 28, United States Code, Section 1746, in or in relation to a case under Title 11, United States Code, in that defendant **ELWOOD "JACK" CLUCK** filed and caused to be filed in the United States Bankruptcy Court for the Western District of Texas as part of his Statement of Financial Affairs a "Schedule B-2 – Personal Property" in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, wherein he knowingly and fraudulently stated in answer to item "q" which asks for "Contingent and unliquidated claims of every nature, including counterclaims of the debtor" that he only had (1) "Accounts receivable for billed but uncollected fees" of $10,000.00 and that he had (2) "Work in progress on pending litigation and office practice (legal)" of $5,000.00, when in truth and in fact, as the Defendant well knew, he greatly understated the market value of his interest in monies and accounts receivables and work in progress owed to him by:

A. Perfect Union Lodge, and

B. The O. D. Dooley Estate.

All in violation of Title 18, United States Code, Section 152.

COUNT II
(18 U.S.C. 152)

1. The Grand jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas:

A. His transfer within one year of the filing of the petition for bankruptcy of a $50,000 Real Estate Lien note and the Dead of Trust securing said note both having been executed on behalf of Perfect Union Lodge, back to Perfect Union Lodge, and

B. The transfer within one year of the filing of the petition for bankruptcy of approximately 351, more or less, acres of land located in McMullen County, Texas, and

C. The transfer within one year of the filing of the petition for bankruptcy of:

1. three jaguar automobiles, and
2. a pickup truck, and
3. a camper, and
4. a boat, and
5. a 1960 Beechcraft Bonanza Airplane:

All in violation of Title 18, United States Code, Section 152.

COUNT III
(18 U.S.C. 152)

1. The Grand jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about June 28, 1991, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck*, Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the receipt of $35,000.00 in payment for a pre-bankruptcy accounts receivable from Perfect Union Lodge. All in violation of Title 18, United States Code, Section 152.

COUNT IV
(18 U.S.C. 152)

1. The Grand Jury reallegs and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK

knowingly and fraudulently made a false statement of under penalty of perjury within the meaning of Title 28, United States Code, Section 1746, in or in relation to a case under Title 11, United States Code, in that defendant

ELWOOD "JACK" CLUCK filed and caused to be filed in the United States Bankruptcy Court for the Western District of Texas a Statement of Financial Affairs in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, wherein he knowingly and fraudulently stated in answer to item "14b" that the only transfer of property that he had made within the prior year was a Deed of Trust covering his community homestead at 417 East Mandalay when in truth and in fact, as he well knew, he had also transferred, within one year before filing his petition:

A. A Real Estate Lien note from Perfect Union Lodge promising to pay the Defendant **ELWOOD "JACK" CLUCK** $50,000.00 and the Real Estate Deed of Trust securing said note, and

B. Approximately 351, more or less, acres of land in McMullen County, Texas; and

C. Three jaguar automobiles; and

D. A pickup truck; and

E. A camper; and

F. A boat; and

G. A 1960 Beechcraft Bonanza Airplane.

All in violation of Title 18, United States Code, Section 152.

COUNT V
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction paragraphs one through five inclusive, of this Indictment.

2. On or about November 8 and 16, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the receipt of $150,000.00 of which approximately $102,000.00 was in payment for a pre-bankruptcy accounts receivable or debt from the O.D. Dooley Estate. All in violation of Title 18, United States Code, Section 152.

COUNT VI
(18 U.S.C. 152)

1. The Grand Jury reallegs and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about November 8 and 16, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the receipt of $150,000.00 of which approximately $48,000.00 was a referral fee for a pre-bankruptcy

referral of a will contest in the O.D. Dooley Estate. All in violation of Title 18, United States Code, Section 152.

COUNT VII
(18 U.S.C. 152)

1. The Grand Jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. From on or about May 1, 1990 and continuing until on or about June 18, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently concealed and caused to be concealed from creditors and custodian and trustee and marshal, and any other officer of the court charged with the control and custody of property, in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, in the United States Bankruptcy Court for the Western District of Texas, the right for himself or his designee to reacquire three jaguar automobiles, a pickup truck, a camper, a boat, and a Bonanza Airplane. All in violation of Title 18, United States Code, Section 152.

COUNT VIII
(18 U.S.C. 152)

1. The Grand jury realleges and incorporates herein by reference the allegations contained in the introduction, paragraphs one through five inclusive, of this Indictment.

2. On or about May 1, 1990, in Bexar County, within the Western District of Texas, defendant,

ELWOOD "JACK" CLUCK,

knowingly and fraudulently made a false statement under penalty of perjury within the meaning of Title 28, United States Code, Section 1746, in or in relation to a case under Title 11, United States Code, in that defendant **ELWOOD "JACK" CLUCK** filed and caused to be filed in the United States Bankruptcy Court for the Western District of Texas as part of his Statement of Financial Affairs a "Schedule B-2 – Personal Property" in the proceeding entitled *In Re: Elwood Cluck,* Case No. 90-50952K, wherein he knowingly and fraudulently stated "none" in answer to item "v" "Equitable and future interests" when in truth and in fact, as he well knew, he had the right for himself or his designee to reacquire three jaguar automobiles, a pickup truck, a camper, a boat, and a Bonanza airplane. All in violation of Title 18, United States Code, Section 152.

A TRUE BILL.

/s/ Stella Coupe
FOREPERSON

JAMES H. DEATLEY
United States Attorney
Western District of Texas

BY: /s/ C. Larry Mathews Jr.
C. LARRY MATTHEWS, JR.
Assistant United States Attorney
State Bar of Texas No. 13191000

APPENDIX 18

NO. 05-51171

THE UNITED STATES COURT OF APPEALS

FOR

THE FIFTH CURCUIT

ELWOOD "JACK" CLUCK,
PETITIONER

VS.

UNITED STATES OF AMERICA
RESPONDENT

AFFIDAVIT IN SUPPORT OF PETITIONER'S OBJECTIONS
AND
MOTION TO DISQUALIFY APPELLATE JUDGES

STATE OF TEXAS
KNOW ALL MEN BY THESE PRESENTS;
COUNTY OF KERR

BEFORE ME, THE UNDERSIGNED AUTHORITY, on the date below stated personally appeared Elwood Cluck, also sometimes known as Elwood "Jack" Cluck, a credible person to me well known who being by me first duly sworn upon his oath deposes and states:

The Booney Moore Judgment

1. In 1987, the heirs of Mrs. Booney Moore, an incompetent/decedent[1] filed suit against the Coble Wall Trust Company and myself individually and as sole stockholder, director and president of the Trust Company and in September 1989, recovered an approximate $3,000,000 judgment in the Probate Court, Bexar County, Texas. The Trust Company was closed and liquidated in November 1989. I retained counsel[2] and appealed the approximate $3,000,000.00 judgment to the Court of Appeals, Fourth Supreme Judicial District of Texas.

Pre-Bankruptcy Proceedings

2. I also retained Harry A. Perrin,[3] a prominent bankruptcy attorney and certified public accountant to advise and assist me in the resolution of other financial affairs resulting from the liquidation of the Trust Company.

3. On or about December 21, 1989, I received a package by mail from Mr. Perrin containing a form for a petition in bankruptcy with related or supplemental forms, including several forms for an Unsworn Declaration Under Penalty of Perjury with instructions to supply the information required by the petition and related forms and

---

[1] Represented by Thomas C. Hall, Attorney at Law, 205 N. Presa, Bldg. A-200. San Antonio, Texas 78205 Tel. 210-222-2200.

[2] Barry McClenahan, Attorney at Law, Ball & Weed, 745 E. Mulberry, San Antonio, Texas 78212 Tel.210-731-6300.

[3] Maddox, Perrin, Kirkendall, Collins & Christie, Attorneys at Law, 4800 NCNB Center, Houston, Texas, later dissolved, and present law firm located in Houston unknown.

additionally sign the forms for an Unsworn Declaration Under Penalty of Perjury, leaving the date of signature blank, and return the package by mail to Mr. Perrin at his Houston Office. On or about December 28, 1989, I completed the information required in the petition and related forms and I additionally signed several forms for an Unsworn Declaration Under Penalty of Perjury, leaving the date of signature blank, and returned the package by mail to Mr. Perrin at his Houston Office according to his instructions.

4. Acting upon the advice and with the prior knowledge and approval of Mr. Perrin, I sold three Jaguar automobiles, a Chevrolet pickup, a Winnebago camper, a 14' aluminum fishing boat and a 1960 Beechcraft airplane on March 23-26, 1990 to Joe Horne, a used car dealer[4] from whom I had purchased the airplane in 1980. The total sales price was $32,000 paid in cash. Pursuant to the advice and instruction of Mr. Perrin, I paid the entire proceeds directly to the Internal Revenue Service in payment of my 1988 and 1989 income taxes. On March 29, 1990, I notified Mr. Perrin of the sale of the automobiles, pickup, camper, boat and airplane.

The Bankruptcy Proceedings

5. On March 30, 1990, my bankruptcy attorney, Harry A. Perrin prepared and filed a petition in bankruptcy on my behalf in Docket No. 90-50952-K (Chapter 7) styled In re: Elwood Cluck, Debtor, In the United States

[4] Joseph A. Horne, Military Motors, 3620 South Flores, San Antonio, Texas.

Bankruptcy Court, Western District of Texas, San Antonio Division.

After filing the petition in bankruptcy, Mr. Perrin instructed Joseph A. Van Ness, a young lawyer employed as an associate in the law firm of Maddox, Perrin, Kirkendall, Collins & Christie, to prepare a Statement of Financial Affairs for filing in the bankruptcy proceedings. Pursuant to the instructions of Harry A. Perrin, his young associate prepared a Statement of Financial Affairs and attached an undated copy of an Unsworn Declaration Under Penalty of Perjury (which I had signed on or about December 21-28, 1989, leaving the date of signature blank according to the instructions of Harry Perrin) to the Statement of Financial Affairs.

7. Thereafter on May 1, 1990, Mr. Perrin filed the Statement of Financial Affairs[5] in the then pending bankruptcy proceedings but, through inadvertence, carelessness, oversight or neglect, Mr. Perrin and/or his young associate failed to report the pre-bankruptcy sales of the automobiles, pickup, camper, boat and airplane in answer to question 14b of the Statement of Financial Affairs.

8. Shortly after the bankruptcy petition was filed on March 30, 1990 the Administrator of the Estate of Booney Moore, Deceased, filed a claim in the bankruptcy proceedings alleging fraud and seeking to set aside the anticipated discharge in bankruptcy of the approximate $3,000,00

[5] The Statement of Financial Affairs filed by Harry A. Perrin on May 1, 1990 consisted of pages numbered 1-10 (omitting a page numbered 11) and attached as page numbered 12 an undated Unsworn Declaration Under Penalty of Perjury (which I had signed on or about December 21, 1989, leaving the date of signature blank according to the instructions of Mr. Perrin).

judgment (paragraphs 1 above) rendered by the Bexar County Probate Court in 1989.

9. In addition to the foregoing, promptly after the bankruptcy petition was filed on March 30, 1990, my former wife, Margaret Cluck, also filed a claim in the bankruptcy proceedings alleging fraud and seeking recovery of approximately $98,000 alleged to be due pursuant to the Divorce Decree which dissolved our marriage on May 6, 1981.

10. A week or so prior to June 18, 1990, Joe Horne (paragraph 4 above) called me and asked me to purchase the automobiles, pickup, camper, boat and airplane at an aggregate price of $39,000. On June 18, 1990, in compliance with the request of Joe Horn, my wife, Kristine Arlitt,[6] acting by and through First Capital Mortgage Company, purchased the automobiles, pickup, camper, boat and airplane for $39,000, the price specified by Joe Horne, the same used car dealer (footnote 4) who had purchased the same vehicles on March 23-26, 1990 for $32,000.[7]

11. In connection with the transaction described above, I advanced the $39,000 purchase price for the

---

[6] I married Christine Arlitt Groos on July 27, 1984. On November 3, 1994, Christine A. Cluck, also known as Kristine A. Cluck, changed her name to Kristine Arlitt in Cause No. 94-CI-15949 styled Ex Parte Christine A. Cluck, in the 225th Judicial District Court, Bexar County, Texas.

[7] The transactions yielded Mr. Joe Horne a $7,000.00 profit (or $132.00 per day) during the 53 day period intervening between his March 23-26, 1990 purchase of the automobiles, pickup, camper, boat and airplane and his June 18, 1990 sale of the vehicles to automobiles, pickup, camper, boat and airplane.

automobiles, camper, boat and airplane to First Capital Mortgage Company, all of which was derived from post-bankruptcy earnings from personal services rendered in the practice of law after March 30, 1990, none of which was derived from pre-bankruptcy accounts receivable.

12. On October 17, 1990, Citizen's State Bank, Receiver for River City Bank, filed a motion in the bankruptcy court seeking foreclosure of the liens held by Citizen's State Bank against collateral consisting of my law office accounts receivable and furniture, fixtures and equipment used in the operation of the Coble Wall Trust Company.

13. On October 19, 1990, while Citizen State Bank's Motion was pending in the bankruptcy court, I concluded a settlement of an $11,800,000 income, estate and gift tax deficiency asserted by the Internal Revenue Service against the Estate of O.D. Dooley, deceased, in litigation then pending in the United States Tax Court in Houston, Texas. Under the terms of the settlement, the Executor of the Estate of O.D. Dooley agreed to pay $143,000 in gift taxes in full settlement and release of the $11,800,000 deficiency asserted by the Internal Revenue Service.

14. Mr. James L. Drought,[8] an attorney, represented the Executors of the Estate of O.D. Dooley, Deceased, in a will contest initiated by the Decedent's daughters during the early part of the 1980s. During the ensuing litigation, James L. Drought, acting personally rather than as attorney for the Estate of O.D. Dooley, Deceased, had acquired, owned and held a $1,000,000 Promissory Note

[8] James L. Drought, Attorney at Law, Drought, Drought & Bobbitt, L.L.P., 112 East Pecan, San Antonio, Texas, 78205 Tel. 210-225-4031.

executed by widow of O.D. Dooley payable to the Decedent's daughters in settlement of the Will contest. The $1,000,000 Note was secured by a Deed of Trust covering approximately 20,000 acres of ranchland situated in South Texas which was subordinate to the $11,800,000 income, estate and gift liens securing the tax deficiency asserted by the Internal Revenue Service against the Estate of O.D. Dooley.

15. As a result of the $143,000 settlement and immediate release of the $11,800,000 income, estate and gift tax liens asserted by the IRS against ranchlands held in the Estate of O.D. Dooley, the market value of the ranchland and other cash collateral securing repayment of the $1,000,000 promissory note executed by widow of O. D. Dooley (which was then owned and held by James L. Drought) was immediately enhanced from zero to an amount sufficient to fully repay the entire unpaid balance, both principal and interest, of the $1,000,000 promissory note.

16. Upon returning to my office following settlement of the $11,800,000 tax deficiency asserted by the Internal Revenue Service against the Estate of O.D. Dooley, deceased, in the United States Tax Court in Houston, Texas, I made an oral offer on October 29, 1990, to compromise and settle of all of my debts owing by Coble Wall Trust Company and myself to Citizens State Bank as Receiver for River City Bank upon payment of $25,000 cash within thirty days.

17. On November 8 and 16, 1990, James L. Drought, the attorney for the widow and the Estate of O.D. Dooley, Deceased, mailed me two unsolicited checks, one dated November 8, 1990 in the amount of $50,000 and the other

dated November 16, 1990 in the amount of $100,000.00, totaling $150,000 in recognition and appreciation of the extinguishment of the estate, income and gift tax liens which resulted in the immediate release of the impediments against the ranchlands and concurrent enhancement in value of the collateral securing payment of the widow's $1,000,000 promissory note.[9]

18. On November 23, 1990, Citizens State Bank, as Receiver, accepted my October 29, 1990 oral offer of $25,000 in full settlement, satisfaction, payment and discharge of all debts owing by the Coble Wall Trust Company and/or myself secured by collateral consisting of my law office accounts receivable and furniture, fixtures and equipment used in the operation of the Coble Wall Trust Company.

19. On November 29, 1995, I also mailed a check in the amount of $20,000 payable to Commonwealth Savings Association to my attorney, Harry A. Perrin, for delivery to Commonwealth Federal Savings Association[10] in full payment, satisfaction and discharge of all of the Promissory Notes and Security Agreements covering the

---

[9] Neither Willie Jo Dooley, the widow of O.D. Dooley, nor C. J. Bitter, Executor, nor any of the beneficiaries of the Estate of O. D. Dooley have ever paid any amount of the attorney's fees due and payable to me for my services rendered in representing the Estate of O. D. Dooley in the United States Tax Court and negotiating the $143,000 settlement and immediate release of the $11,800,000 income, estate and gift tax liens asserted by the IRS against ranchlands held in the Estate of the Decedent.

[10] Commonwealth Savings Association was declared insolvent and closed by the F.S.L.I.C. in mid-1990 and Commonwealth Federal Savings Association was appointed Receiver. Commonwealth Federal Savings Association was also subsequently declared insolvent and closed by the F.S.L.I.C.

collateral held by Commonwealth Savings Association executed by Appellant and/or the Coble Wall Trust Company. Commonwealth Savings Association.

20. Except for the Claimants and/or Creditors mentioned above, no other Claimants or Creditors, either secured or unsecured, filed claims in the bankruptcy proceedings Consequently, at the close of 1990, the sole and only Claimants remaining outstanding and unsatisfied in the bankruptcy proceedings involved litigation (1) initiated by the Administrator of the Estate of Booney Moore, Deceased, (paragraphs 1 and 8 above) seeking satisfaction of the approximate $3,000,000 Judgment in the Booney Moore Case and (2) initiated by my former wife, Margaret Cluck (paragraph 9 above) seeking recovery of approximately $98,000 alleged to be due pursuant to the May 6, 1981 Divorce Decree.

The Reversal of the Booney Moore Judgment and Entry of a Take Nothing Judgment

21. On October 31, 1991, the Court of Appeals, Fourth Supreme Judicial District of Texas, reversed the approximate $3,000,000 judgment rendered in October 1989 against the Coble Wall Trust Company and myself personally and rendered a Take Nothing Judgment in favor of the Trust Company and myself.[11] The Take Nothing Judgment rendered by the Court of Appeals on October 31, 1991, extinguished 99.19%of all of my unsecured

[11] *Coble Wall Trust Co. v. Palmer*, 848 S.W.2d 696 (Tex. App. San Antonio 1991) writ granted, rev'd and remanded, 851 S.W.2d 178 (Tex. 1992), on remand 859 S.W.2d 475 (Tex. App. San Antonio 1993) writ denied.

creditors having claims outstanding in the bankruptcy proceeds, leaving only $22,400 unsecured claims, plus the claims of my former wife, Margaret Cluck, unresolved in the bankruptcy proceedings.

22. After the October 31, 1991 Take Nothing Judgment was rendered by the Court of Appeals, thereby extinguishing the approximate $3,000,000 judgment rendered in 1989, I negotiated a settlement with my former wife, Margaret Cluck, on February 13, 1992 and satisfied, paid and discharged all of her claims (paragraph 9) which she asserted against me, both in the divorce proceedings and in the bankruptcy proceeding. I also negotiated settlements and satisfied, paid and discharged all of my personal creditors, both secured and unsecured, neither of whom had filed a claim in the bankruptcy proceedings or otherwise, independent of and without intervention or assistance by the bankruptcy trustee and without order or compulsion by the bankruptcy court.

The Prosecutor's Target Letter

23. In March, 1992, Randolph Osherow, acting in his capacity as bankruptcy trustee and represented by his *alter ego* corporate law firm, Randolph N. Osherow, P.C.[12] and Thomas W. McKenzie,[13] filed a complaint to recover the automobiles, pickup, camper, boat and airplane which I had sold on March 26-29, 1990 for $32,000, all of which

[12] Randolph N. Osherow, Attorney at Law, d.b.a. Randolph N. Osherow, P.C. 342 West Woodlawn, San Antonio, Texas 78212 Tel 210-738-3001.

[13] Thomas W. McKenzie, Attorney at law, 700 N. St. Mary's St. San Antonio, Texas 78205 Tel 210-227-2698.

was paid to the IRS in payment of my 1988 and 1989 income taxes, (paragraph 4 above) and repurchased on June 18, 1990 for $39,000 (paragraph 10 above).

24. In conjunction with his complaint for recovery of the automobiles, pickup, camper, boat and airplane, Randolph Osherow, acting in his capacity as bankruptcy trustee, initiated an investigation by Assistant United States Attorney C. Larry Mathews,[14] and the Federal Bureau of Investigation into Osherow's allegations of bankruptcy fraud evidenced by the circumstances described in paragraphs 4 and 10 above.

25. In June or July, 1992, acting in concert with Randolph N. Osherow, bankruptcy trustee, AUSA Mathews mailed a "Target Letter" to my wife, Kristine A. Cluck, advising her that she was the subject of a Grand Jury Investigation into the bankruptcy fraud alleged by the bankruptcy trustee, Randolph N. Osherow, evidenced by the circumstances described in paragraphs 4 and 10-11 above.

26. Thereafter, AUSA Mathews served a subpoena addressed to my wife, Kristine A. Cluck requiring her to appear before the Grand Jury convened for the purpose of investigating bankruptcy fraud alleged by the bankruptcy trustee, Randolph N. Osherow. My wife retained Gerald H. Goldstein[15] to represent her in all further proceedings

---

[14] C. Larry Mathews, Jr., Attorney at Law, United States Attorneys Office, 601 N.W. Loop 410, San Antonio, Texas 78216 Tel. 384-7150.

[15] Gerald H. Goldstein, Attorney at Law, Goldstein, Goldstein and Hilley, 310 South St. Mary's Street, San Antonio, Texas 78205 Tel. 210-226-1463.

regarding the Target Letter and the Grand Jury subpoena initiated by AUSA C. Larry Mathews.

27. On the appointed date, my wife, Kristine, accompanied by her attorney, Gerald Goldstein, appeared at the United States Courthouse in response to the Grand Jury subpoena. My wife, Kristine, appeared before the Grand Jury alone and, upon the advice of Gerald Goldstein, claimed the privilege against self incrimination provided by the Fifth Amendment to the Constitution in response to questions propounded by AUSA Mathews regarding the circumstances involving First Capital Mortgage Company, Inc. described in paragraphs 4 and 10-11 above.

28. AUSA Mathews, without seeking random assignment of the matter to a District Judge in rotation according to the usual, customary and procedure for assignment of Judges in the San Antonio Division of the United States District Court, immediately proceeded to Judge Edward C. Prado, claiming that Kristine A. Cluck was in contempt of the Grand Jury in refusing to answer AUSA Mathews' questions in the presence of the Grand Jury regarding the circumstances involving First Capital Mortgage Company, Inc. described in paragraphs 4 and 10-11 above.

29. My wife, Kristine, based on the advice of her attorney, Gerald Goldstein, and relying on the Fifth Amendment, again refused to answer AUSA Mathews' questions in the presence of Judge Prado regarding the circumstances described in paragraphs 4 and 10-11 above. Thereupon, Judge Prado, after hearing testimony and argument of counsel, adjudged Kristine guilty of contempt of Court in refusing, on the grounds stated in the Fifth Amendment, to answer AUSA Mathews' questions in the

presence of Judge Prado regarding the circumstances regarding the circumstances involving First Capital Mortgage Company, Inc. described in paragraphs 4 and 10-11 above. Mr. Goldstein immediately gave Notice of Appeal to the Court of Appeals, Fifth Circuit and Kristine was released without incarceration pending Appeal.

30. The Court of Appeals, Fifth Circuit, declined to hear the Appeal and remanded the case to Judge Prado with instructions to require AUSA Mathews and Gerald Goldstein to resolve the dispute by agreement between the litigants.

31. Upon information and belief formed after reasonable inquiry, AUSA Mathews agreed to forego further prosecution of the Target Letter and additional appearances before the Grand Jury and possible criminal proceedings against Kristine A. Cluck, provided Kristine A. Cluck cooperated with and assisted AUSA C. Larry Mathews in the investigation and prosecution of charges of bankruptcy fraud asserted by the bankruptcy trustee, Randolph N. Osherow (paragraph 21 above) against me.

32. The agreements entered by and between AUSA Mathews and Gerald Goldstein evidencing the undertakings assumed by Kristine A. Cluck were reduced to writing and presented to Judge Prado who approved the agreements and undertakings of my wife, Kristine A. Cluck, and incorporated such agreements into an order of the Court which Judge Prado then Ordered sealed against inspection by myself.

33. AUSA Mathews was morally and ethically[16] as well as professionally and legally[17] prohibited by the provisions of 18 U.S.C. Sec. 201(c)(2), Local Rules of the United States District Court, Western District of Texas, San Antonio Division, Rule AT-4, and Texas Disciplinary Rules of Professional Conduct, V.T.C.A. Government Code Title 2, Subtitle G-Appendix[18] from giving, offering or promising anything of value or leniency or forbearance to Kristine A. Cluck for or because of her testimony or cooperation with and assistance to AUSA C. Larry Mathews in the investigation and prosecution of charges of bankruptcy fraud (paragraph 23) asserted by the bankruptcy trustee, Randolph N. Osherow.

---

[16] *Olmstead v. United States*, 277 U.S.438, 485 (1928) ("Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. . . . To declare that in the administration of the criminal law the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." (Brandeis, J., dissenting)

[17] The United States District and Circuit Courts of Appeal have unanimously rejected the argument that 18 U.S.C. Sec. 201(c)(2) "was not intended to apply to prosecutors pursuing investigations" or that AUSA Mathew was exempt from compliance with Sec. 201(c)(2) and the ethical requirements adopted by the Federal Courts and applicable State Bar Rules of Professional Conduct. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.2d 1252, 1257 (10th Cir. 1993); *United States v. Lopez*, 4 F.3d 1455, 1458-63 (9th Cir. 1993).

[18] *United States v. Ryan*, 903 F.2d 71, 739-40 (10th Cir.1990) cert den. 498 U.S. 855 1990) (The Texas Disciplinary Rules of Professional Conduct, Government Code Title 2, Subtitle G-Appendix, are expressly made applicable to AUSA Mathews by the provisions of Local Rule AT-4 of the United States District Court, Western District of Texas, San Antonio Division.

34. The promise of leniency and absolution from potential criminal implications in connection with the investigation and prosecution of charges of bankruptcy fraud obviously imports and reflected a greater threat to the trustworthiness and veracity of Kristine A. Cluck than a significant cash payment or similar pecuniary motivation.[19]

35. The particularly self-serving agreements entered into by Kristine A. Cluck with AUSA Mathews and approved and ratified by Judge Prado, motivated by her sense of "self preservation"[20] in order to avoid further appearances before the Grand Jury by Kristine A. Cluck, obtain additional leniency and absolution from potential criminal implications in connection with the investigation and prosecution of charges of bankruptcy fraud asserted by the bankruptcy trustee, Randolph N. Osherow (paragraph 23) inexorably tainted the subsequent criminal proceedings and contravened the explicit purposes of 18 U.S.C. Sec. 201(c)(2) to establish truthfulness of all further proceedings free of all influences of deceit, misstatements of fact and outright lies.[21]

---

[19] *United States v. Meinster*, 618 F.2d 1041, 1045 (4th Cir. 1980) ("We think it obvious that promises of immunity or lenience premised on cooperation in a particular case may provide a strong inducement to falsify in that case.").

[20] *United States v. Kimble*, 719 F.2d 1253, 1255-57 (5th Cir. 1983).

[21] *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence . . . "); *United States v. Schwartz*, 785 F.2d 673, 690 (9th Cir. 1986) ("A violation of trust which is influenced by the offer of an intangible service is no less damaging . . . than if the influence was in the form of a cash kickback.") cert. den. 479 U.S. 890 (1986).

The Bankruptcy Trustee's Attorneys Fees

36. On August 19, 1993, I sought dismissal of the bankruptcy proceedings on the grounds that the reversal of the approximate $3,000,000 judgment and entry of the Take Nothing Judgment rendered by the Court of Appeals on October 31, 1991 extinguished the claims of the heirs of Booney Moore, deceased, which comprised 99.19% of all of my unsecured creditors, plus the fact that I had compromised and paid all of my creditors, both secured and unsecured, outstanding on March 30, 1990, including the claims of my former wife, Margaret Cluck, outside of and independent of the bankruptcy proceedings, without intervention or assistance by the bankruptcy trustee and without any order or compulsion by the bankruptcy court.

37. My petition for dismissal of the bankruptcy proceedings was denied by the bankruptcy court[22] unless and until I satisfied and paid all of the fees claimed by Randolph N. Osherow, trustee, and the bankruptcy trustee's solely owned alter ego corporate law firm, Randolph N. Osherow, P.C., and his associate attorney and business partner, Thomas W. McKenzie.

38. In order to collect his attorneys fees, Randolph N. Osherow, acting in his capacity as bankruptcy trustee, sought and obtained judgment on December 31, 1992 for recovery of the automobiles, camper, boat and airplane, plus a money judgment for $208,000 based on my receipt of $150,000 in November 1990 (paragraph 13-17) as a result of the Tax Court litigation involving the Estate of O.D. Dooley, Deceased which I settled in October 1990.

---

[22] Bankruptcy Judge Ronald B. King, U.S. Bankruptcy Court, P.O. Box 1439, San Antonio, Texas 78295.

39. After the December 31, 1992 Judgment, the bankruptcy trustee seized and sold the automobiles, camper, boat and airplane for a gross recovery aggregating $56,600, minus a 20% commission paid to the trustee's "liquidating agent", (whose wife was employed by the bankruptcy trustee) for a net recovery of $44,960, all of which was applied to the payment of the attorneys fees claimed by Osherow and his solely owned alter ego corporate law firm, Randolph N. Osherow P.C. and his associate attorney, Thomas W. McKenzie.

40. Thereafter, Osherow sold my 119.2 acres farm valued at approximately $250,000.00, which included my home and personal residence, located in Wilson County, Texas, for $142,000, all of which was also applied to the payment of the attorneys fees claimed by the bankruptcy trustee and his solely owned alter ego corporate law firm and his associate attorney.

41. On September 21, 1997, Randolph N. Osherow, reverting to his capacity as bankruptcy trustee, filed "Form II – Cash Receipts and Disbursements Record" in the bankruptcy court, which reflected the recovery of $218,347 at the times, and in the amounts as follows:

Date	Source	Property Seized/Sold	Amount Recovered
Sept 4. 1990	Elwood Cluck	Farm Equipment	$ 1,250.00
Oct. 4, 1990	Elwood Cluck	Farm Equipment	$ 1,250.00
May 8, 1991	Elwood Cluck	Oil and Gas Royalties	$ 14,000.00
May 8, 1991	Elwood Cluck	Fed. Land Bank Stock	$ 2,247.00

May 18, 1993	Elwood Cluck	1960 Beechcraft Airplane	$ 30,900.00
Aug. 23, 1993	Elwood Cluck	1960 Jaguar Convertible 1957 XKE Jaguar Coupe 1984 Jaguar XJS Coupe 1983 Chevrolet pickup	$ 25,600.00
Sept. 22, 1993	Elwood Cluck	1960 Lone Star boat, trailer	$ 550.00
		1970 Winnebago Camper	$ 550.00
April 3, 1995	Elwood Cluck	119.2 acres, Wilson County, Texas	$142,000.00
Total Amounts Recovered and Sold Prior to Trial and Sentencing referred to below:			$218,347.00[23]

42. The "Form II – Cash Receipts and Disbursements Record" supplemented by the "Supplemental Final Report Before Distribution" filed Randolph N. Osherow, bankruptcy trustee, on September 25, 1997 also shows that Osherow, acting in his capacity as bankruptcy trustee, paid nothing to secured creditors nor unsecured creditors:

> "(b) $-0- for priority creditors, in the order specified in 11 U.S.C. Sec. 507(a)(2)
>
> . . . [and]

[23] On September 26, 1997, Kristine Arlitt, paid the bankruptcy trustee an additional $107,880.00 in order to obtain her release from the December 30, 1992 judgment in the bankruptcy court, bringing the total recovery by the bankruptcy trustee to $356,125.85.

"(c) $-0- for general unsecured creditors who have filed claims allowed in the total amount of $2,438,733.10,[24] yielding a dividend rate of -0-%. . . ."

43. Osherow's claim set forth in his "Form II – Cash Receipts and Disbursements Record" and his "Supplemental Final Report Before Distribution" filed on September 25, 1997, that the $2,438,733.10 Judgment in the Booney Moore Case was allowed and approved by the bankruptcy court is an unequivocal, self evident and demonstrably false oath or account by the bankruptcy trustee in violation of 18 U.S.C. Sec. 152(2) and (4).[25]

44. After the Fourth Texas Court of Appeals reversed the approximate $3,000,000 judgment 89 against the Coble Wall Trust Company and myself personally and rendered a Take Nothing Judgment in favor of the Trust Company and myself on October 31, 1991, the Administrator of the Estate of Booney Moore filed an appeal to the Supreme Court of Texas which reversed the Court of Appeals on jurisdictional grounds and remanded Case to the Fourth Court of Appeals, which again reversed the approximate $3,000,000 judgment and rendered a Take Nothing Judgment in favor of the Trust Company and

---

[24] The $2,438,733.10 claim filed by the Estate of Booney Moore, deceased was neither allowed nor approved by the bankruptcy court but was extinguished when the judgment was reversed and a Take Nothing Judgment rendered by the Fourth Court of Appeals, San Antonio, Texas, on October 31, 1991. See footnote 10 above.

[25] 18 U.S.C. Sec. 152: "A person who – (2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11; [or] (4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy or attorney; – shall be fined, imprisoned not more than 5 years or both.

myself. The Administrator of the Estate of Booney Moore filed a second appeal to the Supreme Court of Texas, which was denied.[26] I thereafter filed a Motion for Summary Judgment in the bankruptcy court and all claims of the Administrator of the Estate of Booney Moore were dismissed as moot.

45. Not one single penny was ever paid by the bankruptcy trustee to any claimant or creditor, secured or unsecured, in the bankruptcy proceedings, all of whom were paid, satisfied and their debts and claims discharged by myself acting independently of the bankruptcy trustee and independently of the bankruptcy court without any order, judgment or decree of the bankruptcy judge.

46. In summary, Randolph Osherow, acting in his capacity as bankruptcy trustee recovered a total of $218,347.00 in cash, net of expenses of sale, with the assistance and approval of the bankruptcy court, prior to the inception of the criminal proceedings mentioned below, none of which was paid to any secured or unsecured creditor but all of which was, with the approval of the bankruptcy court, applied to the payment of attorneys fees claimed by and Randolph N. Osherow, P.C., the bankruptcy trustee's solely owned alter ego corporate law firm and Thomas W. McKenzie, his associate attorneys.[27]

---

[26] *Coble Wall Trust Co. v. Palmer*, 848 S.W.2d 696 (Tex. App. San Antonio 1991) writ granted, rev'd and remanded, 851 S.W.2d 178 (Tex. 1992), on remand 859 S.W.2d 475 (Tex. App. San Antonio 1993) writ denied.

[27] It is universally recognized, except in the present case, that bankruptcy estates should not be consumed by the fees and expenses of court appointed professionals. *In re: Consolidated Bancshares*, 785 F.2d 1249, 1255 (5th Cir. 1986); *Matter of Taxman Clothing Co.*, 49 F.3d 310,

(Continued on following page)

The Indictment

47. On March 27, 1995 the Grand Jury issued an Indictment prepared by AUSA Mathews in collaboration with bankruptcy trustee Randolph N. Osherow based on alleged violations of 18 U.S.C. Sec. 152 (concealment of assets in bankruptcy) in conjunction with 28 U.S.C. Sec. 1746 (Unsworn Declaration Under Penalty of Perjury).

48. The Indictment presented by the Grand Jury set forth the following charges:

> Counts I, III, V and VI charged that I "greatly under-estimated" the fair market value[28] on May 1, 1990 of two of my Law Office accounts receivable and thereby concealed the collection of both accounts[29] (AUSA Mathews alleged that the $150,000 which I received in November 1990 as a result of the settlement of the income, estate and gift tax litigation in the Tax Court on October 19, 1990 (paragraphs 13, 14, 15 and 17 above) was a

---

314, 316 (7th Cir. 1995); *In re: Toney*, 171 B.R. 414, 415 (Bkr. S.D. Fla. 1994); *In re: Arnold*, 176 B.R. 13 (Bkr. E.D. Tex. 1995); *In re: Witts*, 1995 W.L. 153017 (Bkr. E.D. Tex. 1995.

[28] My estimate of the fair market value of my law office accounts receivable is not a criminal act, which constitutes an Offense Against the United States. *Presidio Enterprises, Inc. v. Warner Bros Dist. Corp.*, 784 F.2d 674, 678-79 (5th Cir. 1986) ("[E]xpressions of opinion are not actionable . . . actions for fraud or misrepresentation must be based on objective statement of fact, not expression of personal opinion.").

[29] The funds described in Count III were received upon compromise and settlement of a delinquent $35,000 law office account receivable approximately two years after the inception of the bankruptcy case on March 30, 1990 which was initially acquired as a part of the collateral initially acquired upon compromise and payment of the debts owing to Citizens State Bank (paragraphs 12, 16 and 18 above) and did not comprise a part of the bankruptcy estate" as defined in 11 U.S.C. Sec. 541.

"$102,000 pre-bankruptcy" account receivable" and a "$48,000 referral fee" rather than "earnings from service performed by an individual debtor after commence of the case" on March 30, 1990 within the scope of 11 U.S.C. Sec.541(a)(6).[30]

Counts II and IV charged me with making a false statement pursuant to an Unsworn Declaration Under Penalty of Perjury and concealing the pre-bankruptcy sale of the automobiles, pickup, camper, boat and airplane based on the failure of my attorney, Harry Perrin, to disclose the sale in the Statement of Financial Affairs.[31]

Counts VII and VIII charged me with making a false statement pursuant to an Unsworn Declaration Under Penalty of Perjury and thereby concealing an oral "right to repurchase" the automobiles, pickup, camper, boat and airplane in violation of 18 U.S.C. Sec. 152 (AUSA Mathews alleged that the oral "right to repurchase" the vehicles was a "future interest" which was not disclosed on the Statement of Financial Affairs filed on May 1, 1990.[32]

---

[30] The $150,000 referred to in Counts V and VI was received by me on November 8 and 18, 1990 as a result of the settlement of the income, estate and gift tax litigation in the Tax Court on October 19, 1990 (paragraphs 13, 14, 15 and 17 above) which constitute "earnings from services performed by an individual debtor after the commencement of the [bankruptcy] case" on March 30, 1990 as defined in 11 U.S.C. Sec. 541(a)(6) which are specifically excluded from the bankruptcy estate.

[31] The third element statutorily required by 28 U.S.C. Sec. 1746 (i.e., the day, month and year when the Unsworn Declaration was signed) is not stated by the Grand Jury in either of Counts I, II, IV and VIII and the charges expressed in Counts I, II, IV and VIII were therefore barred by the Statute of Limitations set forth in 18 U.S.C. Sec. 3282.

[32] The "right . . . to reacquire . . . referred to in Counts VII and VIII is not an "Equitable and Future Interest" known to or recognized by

(Continued on following page)

49. The Indictment prepared by AUSA Mathews and issued by the Grand Jury failed to accuse me of committing an Offense against the United States as defined in18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746 because:

A. There is no allegation in the Indictment that I violated either or any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152 or that my actions as described in the Indictment were considered by the Grand Jury to constitute an Offense Against the United States under either or any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec.152 in conjunction with 28 U.S.C. Sec. 1746.

B. There is no allegation in the Indictment that the actions considered by the Grand Jury to constitute an Offense Against the United States under 18 U.S.C. Sec.152 in conjunction with 28 U.S.C. Sec. 1746 are material to the bankruptcy proceedings;

C. There is no allegation in the Indictment that the Unsworn Declaration Under Penalty of Perjury authorized by 28 U.S.C. Sec. 1746 was subscribed and *dated by Petitioner as the Declarant* within five years prior to the issuance of the Indictment on March 27, 1995, or that the Unsworn Declaration Under Penalty of Perjury was material to the

---

statutory or common law nor enforceable as a common law contract due to lack of consideration and therefore is a contractually non-existent *nudam pactum* under the substantive law of the State of Texas which contravenes the Statute of Frauds set forth in Texas Bus. & Comm. Code Sec. 201.1

any matter alleged to be offensive under the provisions of 28 U.S.C. Sec.1746.

50. In summary, the Indictment prepared by AUSA Mathews and issued by the Grand Jury on March 27, 1995 failed to accuse me of committing an Offense Against the United States as defined in 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746 because:

A. The Grand Jury did not specify which, if either or if any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152 that I was accused of violating;

B. The Grand Jury did not allege that my actions considered to be offensive under 18 U.S.C. Sec.152 in conjunction with 28 U.S.C. Sec. 1746 are material to the bankruptcy proceedings;

C. The Grand Jury did not allege that the Unsworn Declaration Under Penalty of Perjury authorized by 28 U.S.C. Sec. 1746 was subscribed and ***dated by Petitioner as the Declarant*** within five years prior to the issuance of the Indictment on March 27, 1995, or that the Unsworn Declaration Under Penalty of Perjury was material to the any matter alleged to be offensive under the provisions of 28 U.S.C. Sec.1746.

thereby resulting in a failure to state the commission of an Offense Against the United States as defined in either any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152 in conjunction with. 28 U.S.C. Sec. 1746 and further resulting in a lack of Subject Matter Jurisdiction and, finally, a complete miscarriage of justice.

51. Judge Prado failed to review the Indictment and (1) acknowledge its failure to specify any or either of the nine separate subdivisions of 18 U.S.C. Sec. 152 and (2) recognize the required element of "materiality" of an Offense Against the United States as defined in18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746 or (3) recognize the failure of the Indictment to specify the date of signature of the Unsworn Declaration Under Penalty of Perjury required by 28 U.S.C. Sec. 1746.

52. One must conclude, therefore, that Judge Prado failed to discharge his Constitutional duty and judicial obligation to determine that the Indictment alleged an Offense Against the United States and thus assure himself that the District Court had Subject Matter Jurisdiction of the proceedings prior to the Trial, during the Trial and after the Trial.

Pre-Trial Proceedings

53. The Indictment was initially assigned to Judge Hippo F. Garcia who recused himself pursuant to 28 U.S.C. Sec. 455(b)(3) because of his personal knowledge and familiarity with the bankruptcy proceedings (paragraphs 5-46) mentioned above and because Judge Garcia had previously expressed an opinion concerning the merits of the particular case in controversy.[33]

[33] 28 U.S.C. Sec. 455: *Disqualification of justice, judge or magistrate.* (a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned . . . (b) He shall also disqualify himself in the following circumstances: (3) Where he has served in governmental employment and in such capacity . . . expressed an opinion concerning the merits of the particular case in controversy,

54. Upon the recusal of Judge Garcia, AUSA Mathews orally requested the District Clerk to informally assign the Case and Indictment to Judge Edward C. Prado[34] for Trial, contrary to the usual, customary and routine assignment of Judges by random selection and assignment.

55. Because of his personal knowledge and familiarity with the undertakings and agreements by Kristine A. Cluck to assist AUSA Mathews (paragraphs 32-35) in connection with the Indictment and subsequent criminal proceedings and because Judge Prado had previously expressed an opinion concerning the merits of the case,[35] Judge Prado should have voluntarily recused himself pursuant to 28 U.S.C. Sec. 144 and Sec. 455(b)(3) in order to avoid any appearance of bias or impartiality.

The Plea of Not Guilty

56. Upon notification of the Indictment, I voluntarily turned myself in to the United States Marshall's Office in the United States Courthouse, San Antonio, Texas, on March 28, 1995. With the financial assistance of my son

---

[34] AUSA Mathews had previously relied upon Judge Prado to consider his Motion to find my former wife, Kristine, guilty of contempt of Court in refusing to answer AUSA Mathews' questions before the Grand Jury on the grounds stated in the Fifth Amendment.

[35] Judge Prado, after hearing questions and argument of AUSA Mathews regarding the pre-bankruptcy sale of the automobiles, pickup, camper, boat and airplane on March 26-29, 1990 (paragraphs 4 above) followed by the post-bankruptcy purchase of the automobiles, pickup, camper, boat and airplane by First Capital Mortgage Company, Inc. (paragraph 10 and 11 above) held Kristine guilty of contempt of Court in refusing to answer AUSA Mathews' questions in regard to the foregoing matters in the presence of Judge Prado

and daughter, I employed Jack Paul Leon,[36] to represent me in the entire criminal proceedings arising out of the Indictment and upon arraignment, I entered a Plea of Not Guilty to the charges and accusations set forth in the Indictment.

57. On April 27, 1995, precisely 30 days after the Indictment, Kristine Arlitt[37] filed her Petition for Divorce in No. 95-CI-0598, in the 166th Judicial District Court, Bexar County, Texas. Her Petition for Divorce was granted on May 6, 1996.

58. The Plea of Not Guilty to the charges and accusations set forth in Counts I-VIII of the Indictment placed Subject Matter Jurisdiction in issue[38] as well as all elements of an Offense Against the United States as defined in 18 U.S.C. Sec. 152 and 28 U.S.C. Sec. 1746.

59. Because the United States District Court is of limited jurisdiction,[39] there is an initial presumption

---

[36] Jack Paul Leon, Attorney at Law, dba Law Offices of Jack Paul Leon, 500 Lexington, San Antonio, Texas, 78215 Tel. 210-223-4254.

[37] In compliance with his agreements (paragraph 31 above) for leniency, AUSA Mathews held an Indictment against Kristine Arlitt in abeyance subject to her assistance to AUSA Mathews in prosecuting the Indictment issued by the Grand Jury against me on March 27, 1995. The intimidating actions of AUSA Mathews which were sanctioned and approved by Judge Prado (paragraph 35 above) violated 18 U.S.C. Sec. 201(c)(2) for the reasons stated in paragraphs 33-35 and footnotes 15-20 above.

[38] *United States v. Baucum*, 80 F.3d 539 (DC Cir. 1996) (Every federal prosecution presents the threshold question of Subject Matter Jurisdiction.).

[39] *Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) ("As federal courts, we are courts of limited jurisdiction, deriving our power solely from Article III of the Constitution and from the legislative acts of Congress. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des*

(Continued on following page)

arising upon entry of my Plea of Not Guilty that the District Court lacks Subject Matter Jurisdiction to entertain the charges and accusations set forth in Counts I-VIII of the Indictment issued by the Grand Jury filed on March 27, 1995.[40]

60. Upon entry of the Plea of Not Guilty, Judge Prado had the legal duty and judicial obligation to assure himself that the United States District Court had Subject Matter Jurisdiction pursuant to Article III Section 2 cl. 1 of the Constitution to entertain the Indictment, prosecution, Trial, Judgment and imposition of Sentences of imprisonment and restitution upon Petitioner.[41]

61. My Plea of Not Guilty required Judge Prado at a minimum to examine the Indictment in the context of 18 U.S.C. Sec. 152 and 28 U.S.C. Sec. 1746 in order to determine whether the Indictment accused me of an Offense against the United States and thus satisfy the requirements of Article III Section 2 cl. 1 of the Constitution establishing Subject Matter Jurisdiction in the District

---

Bauxites, 456 U.S. 684, 701-02, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). We therefore cannot derive power to act from the actions of the parties before us. *See id. at 702.*")

[40] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, at 561, 112 S.Ct. 2130, at 2136 (1992); *Thomson v. Gaskill*, 315 U.S. 442, at 446, 62 S.Ct. 673, at 675 (1942); *Howery v. Allstate Insurance Co*mpany, 243 F.3d 912, at 916 (5th Cir. 2001); *Michigan S. R.R. v. Branch and St. Joseph Counties Rail Users Association*, 287 F.3d 568, at 573 (6th Cir. 2003); *Luckett v. Bure*, 290 F.3d 493, at 496-97 (2nd Cir. 2002).

[41] *Commercial Nat'l. Bank of Chicago v. Demos*, 18 F.3rd 485, 487 (7th Cir. 1994) ("That the parties have not contested, nor the district court considered jurisdiction does not impede our inquiry . . . [W]e must consider the issue *sua sponte* when it appears from the record that jurisdiction is lacking.")

Court to entertain the Indictment and Trial and impose Judgment upon Petitioner.

The Failure to Determine Subject Matter Jurisdiction

62. Subject Matter Jurisdiction and cannot be conferred upon the Court by agreement of Judge Prado and AUSA Mathews or waived by myself as the accused. The failure of the Indictment to allege the commission of an Offense Against the United States as defined in one or more of the nine (9) subsections of 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746 is readily apparent on the face of the Indictment.

63. No one can reasonably deny that Judge Prado was charged with the Constitutional duty and judicial obligation pursuant to Article III Section 2 cl. 1 of the Constitution to assure himself that the District Court acquired and maintained Subject Matter Jurisdiction pursuant to the Indictment to entertain the Indictment and Trial and impose Judgment upon Petitioner

64. No one can reasonably deny the self-evident fact that Judge Prado, through indifference, inadvertence, carelessness, oversight or neglect, failed to discharge his Constitutional duty and judicial obligation to review the Indictment in the context of 18 U.S.C. Sec. 152 and 28 U.S.C. Sec. 1746 in order to assure himself that the District Court had Subject Matter Jurisdiction of the proceedings.

65. The failure of Judge Prado to undertake and discharge his legal duty and judicial obligation to assure himself of jurisdiction of the District Court pursuant to Article III Section 2 cl. 1 of the Constitution, with the

resulting Trial and Judgment in violation of the Fifth, Sixth and Seventh Amendments, constitutes an error of the most fundamental character.

66. AUSA Mathews as Attorney of Record for the United States was also required at the outset to establish Subject Matter Jurisdiction in the District Court to entertain the Indictment and Trial and impose Judgment upon Petitioner.[42]

67. AUSA Mathews, as Attorney of Record for the United States, had both the burden of proof and the burden of going forward with the evidence to meet the initial presumption of lack of Subject Matter Jurisdiction arising upon entry of my Plea of Not Guilty in order to establish that the United States District Court had Subject Matter Jurisdiction to entertain the Indictment and Trial and impose Judgment upon Petitioner.[43]

68. The failure of the Indictment to allege the commission of an Offense Against the United States as defined in one or more of the nine (9) subsections of 18 U.S.C. Sec. 152 is directly attributable to AUSA Mathews who drafted the Indictment and procured the endorsement of the Grand Jury. Notwithstanding his unique knowledge of the facts and the legal requirements of Article III

---

[42] AUSA Mathews was required to prove the existence of Subject Matter Jurisdiction by a preponderance of the evidence. *Irwin v. Veterans Administration*, 874 F.2d 1092, 1096 (5th Cir. 1989) affd. *sub nom. Irwin v. Dep. Of Veterans Affairs*, 498 U.S. 89, 111 S.Ct. 453 (1991)

[43] Fed. R. Evid. Rule 301: The presumption imposes the burden of going forward with evidence on AUSA Mathews to rebut or meet the presumption; the burden of proof in the sense of the risk of nonpersuasion remains through the trial upon AUSA Mathews on whom it was originally cast.

Section 2 cl. 1 of the Constitution, AUSA Mathews has *never* at any time or in any prior or present proceeding in this Case offered any evidence or legal authorities or arguments or conclusions of law in order to discharge his burden of going forward with the evidence and/or discharge his burden of proof to establish that the United States District Court had Subject Matter Jurisdiction to entertain the Indictment and Trial and impose Judgment upon Petitioner

69. By his failure to appear and offer proof that I committed an Offense against the United States as defined and described in 18 U.S.C. Sec. 152 and 28 U.S.C. Sec. 1746, AUSA Mathews, as Attorney of Record for the United States, thereby admitted the lack of Subject Matter Jurisdiction required by Article III Section 2 cl. 1 of the Constitution to entertain the Trial and impose Judgment pursuant to the Indictment issued by the Grand Jury on March 27, 1995.

70. The failure of AUSA Mathews to offer evidence and proof of Subject Matter Jurisdiction in rebuttal to the initial presumption of Lack of Subject Matter Jurisdiction does not discharge or abrogate the legal duty and judicial obligation imposed on Judge Prado by Article III Section 2 cl. 1 of the Constitution to undertake an investigation and determination to assure himself of Subject Matter Jurisdiction of the District Court pursuant to Article III Section 2 cl. 1 of the Constitution.

71. Implicit in his legal duty and judicial obligation under the Constitution to determine Subject Matter Jurisdiction for himself, Judge Prado was procedurally required and judicially obligated to inquire into and seek an explanation for the failure of AUSA Mathews to rebut

the initial presumption of lack of Subject Matter Jurisdiction in the District Court or otherwise sustain the default and dismiss the proceeding.

72. Judge Prado ignored and disregarded the failure of AUSA Mathews to offer evidence and proof of Subject Matter Jurisdiction in rebuttal to the initial presumption of lack of Subject Matter Jurisdiction in the District Court with the result that Judge Prado failed and refused to dismiss the proceedings based on the deficiencies in the Indictment and the legal and procedural defaults occasioned by AUSA Mathews.

73. Judge Prado's disregard of AUSA Mathews' failure to undertake and discharge his burden of proof to establish Subject Matter Jurisdiction required by Article III of the Constitution portrays a tolerant bias or, if intentional, a *de facto* "cover-up" evidenced by silence on the part of Judge Prado and AUSA Mathews and the supervisory United States Attorney, of the negligence, incompetence and/or professional malpractice on the part of AUSA Mathews in drafting of the Indictment and his default in responding the initial presumption of lack of Subject Matter Jurisdiction in the District Court.

The Withdrawal of Counsel

74. The Indictment was set for trial in July 1995 but my attorney, Jack Paul Leon, sought and obtained a continuance based on his involvement in other litigation. In expectation of an early resolution of the litigation, I asked Mr. Leon to file a Motion to Dismiss the Indictment based on claims of Double Jeopardy. When the Motion was

set for Hearing, Mr. Leon failed to appear and John F. Carroll,[44] the son-in-law and young associate of Jack Paul Leon, argued the Motion. At the conclusion of the Hearing, Judge Prado denied. of the Motion.

75. After denial of the Motion to Dismiss the Indictment based on claims of Double Jeopardy, John Carroll filed a tardy Notice of Appeal. The Court of Appeals, 5th Circuit, remanded the Appeal for lack of timely Notice of Appeal; whereupon, Judge Prado granted leave to file a second Notice of Appeal out of time. Upon subsequent consideration, the Court of Appeals, 5th Circuit, affirmed the denial of the Motion to Dismiss the Indictment based on claims of Double Jeopardy

76. Thereafter, in September 1995, Jack Paul Leon filed a Motion for Withdrawal based on what he termed "unhappy differences" which arose between Mr. Leon and myself.[45] without consulting me in advance and without first seeking my consent and agreement for his withdrawal. Judge Prado granted Mr. Leon's Motion for Withdrawal in Chambers without Notice to me and without a Hearing and without otherwise affording me an opportunity to accurately determine or controvert Mr. Leon's

---

[44] John F. Carroll, Attorney at Law, 111 Olmos Drive, San Antonio, Texas 78212 Tel. 210-829-7183

[45] Jack Paul Leon had been paid $50,000 during March through September. 1995, prior to his Motion for Withdrawal in part payment of his agreed fee of $75,000 for his services as my attorney through and including the Trial of this Case, none of which was refunded due to lack of performance of the contract of employment.

allegations regarding the "unhappy differences"[46] which precipitated his withdrawal as my attorney.

77. Upon withdrawal of Jack Paul Leon, Judge Prado appointed the Federal Public Defender, Mr. Lucian Campbell, to represent me in the pending criminal proceedings and Mr. R. Clark Adams,[47] was assigned to the case. At some point in the early fall of 1996, the Public Defender filed a Motion for Withdrawal based on an investigation by the Federal Bureau of Investigation concerning allegations accusing me of extortion directed to R. Clark Adams, the Assistant Public Defender. The information which the FBI developed and reported to Judge Prado was not and has not been disclosed to me. In October 1996, Judge Prado granted the Public Defender's Motion for Withdrawal in Chambers without Notice and without a Hearing based on the undisclosed investigation conducted by the FBI.

78. Thereafter, I employed Mr. Royal K. Griffin, Attorney at Law,[48] to represent me in the Trial arising out of the March 27, 1995 Indictment.

---

[46] The "unhappy differences" suggested by Mr. Leon were occasioned by my insistence that Mr. Leon should handle the representation himself, rather than through his son-in-law and youthful and inexperienced associate in his office, and bring the Case to a speedy trial which he had deferred in order to undertake representation in a more lucrative case.

[47] Office of the Public Defender, Federal Building, 727 East Durango Blvd., Room 207, San Antonio, Texas 78206 Tel. 210-472-6700

[48] Royal K Griffin, Attorney at Law, 511 French Place, San Antonio, Texas 78212 (Tel. 210-732-6219 fax 210-737-1459).

The Trial and Verdict of the Jury

79. Trial before Judge Prado with AUSA Mathews as the Prosecutor commenced before a Jury[49] on January 6, 1997 and concluded on January 18, 1997.

80. During the third or fourth day of the Trial, a group of young Boy Scouts, 12 to 15 years of age, came into the Courtroom where the Trial was underway, apparently to see how the Federal system operated, and occupied the area reserved for spectators. Judge Prado, who was presiding, interrupted the testimony of the Witness who was then on the Witness Stand and invited several of the young Boy Scouts to assume the various offices of the Court. One young boy was designated by Judge Prado as the Bailiff and instructed to seat himself along side the Jury Box – another was designated by Judge Prado as the Marshal and instructed to occupy a position at the rear of the Courtroom – another was designated by Judge Prado as the Clerk and instructed to occupy a position immediately in front of the Judge's Bench – another was designated by Judge Prado as the Court Reporter and instructed to also take a position immediately in front of the Judge's Bench.

---

[49] The Fifth and Sixth Amendments to the Constitution guaranteed my right to demand that a Jury (rather than Judge Prado) find me guilty upon proof beyond a reasonable doubt of every fact necessary to constitute all of the elements of an Offense Against the United States as described in Counts I through VIII of the Indictment, based upon evidence offered by the AUSA Mathews and admitted in evidence by Judge Prado in open Court and thereafter embodied in the Charge submitted by Judge Prado to the Trial Jury, followed by a Verdict of the Jury establishing my guilt beyond a reasonable doubt of all of the elements of an Offense Against the United States as set forth in Counts I through VIII of the Indictment.

81. When those arrangements had been made and the young Boy Scouts had taken their respective positions in accordance with the instructions of Judge Prado, Judge Prado took off his long black judicial robe and clothed the young boy who Judge Prado had designed as the presiding Judge and then jovially instructed the young Boy Scout, thus clothed, to take the seat vacated by Judge Prado and preside during the continuance of the Trial.

82. At that juncture, Judge Prado, being divested of the robes of his judicial office and appearing coatless in his shirtsleeves, retired to the opened door providing ingress and egress to the corridor leading from the Courtroom to Judge Prado's Chambers where he lounged against the doorpost of the opened door, facing the corridor with his back to the Courtroom, sometimes half in the Courtroom and half or more outside the Courtroom in the corridor. Judge Prado directed AUSA Mathews to continue the examination of the Witness. From time to time, Judge Prado instructed the young Boy Scout whom he designated as the Judge how to respond to objections by Counsel. At least once, and possible twice, Judge Prado situated himself completely outside the Courtroom and wholly in the corridor while he addressed someone in the corridor, although at that point he turned and faced the interior of the Courtroom while instructing the young Boy Scouts in regard to the discharge of their respective duties according to the offices and positions designated by Judge Prado.

83. After approximately twenty or thirty minutes of the jocular activities described above, Judge Prado dismissed the young Boy Scouts from their assigned positions and resumed his position as presiding Judge and adjourned the Trial briefly in order to allow the Boy Scout Troop to clear the Courtroom. My attorney, Royal Griffin

declined to move for a mistrial and dismissal of the Jury based on Judge Prado's mockery of the solemn Trial proceedings resulting in a denial of the Due Processes of the Law.

84. AUSA Mathews did not offer any evidence or proof during the course of the Trial (1) establishing my guilt beyond a reasonable doubt of an Offense Against the United States as defined in either of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152 or (2) establishing beyond a reasonable doubt that the accusations in Counts I through VIII of the Indictment were material to either the bankruptcy or criminal proceedings or (3) establishing beyond a reasonable doubt that the Unsworn Declaration Under Penalty of Perjury was signed on a specific date within five years preceding the Indictment dated March 27, 1995 as required by 28 U.S.C. Sec. 1746 or (4) that any Creditor or Claimant in the bankruptcy proceeding suffered the loss of any money or property as a consequence of any of the accusations set forth in the Indictment or otherwise or (5) that the bankruptcy trustee suffered any loss of money or property as a consequence of any of the accusations against me as set forth in the Indictment or otherwise.

85. No Creditor or Claimant in the bankruptcy proceedings appeared as a witness during the Trial offering to testify that any Creditor or Claimant in the bankruptcy proceeding suffered the loss of any money or property as a consequence of any of the accusations set forth in the Indictment or otherwise or offering to testify that I had committed any measure of legal or factual "bankruptcy fraud" contemplated in the either the Bankruptcy Code or the Criminal Code or offering to testify that I had committed an Offense Against the United States as

defined in either of the nine (9) separate and distinct subsections of 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746.

86. After the close of the evidence and after both AUSA Mathews and Petitioner rested, Judge Prado submitted his Charge to the Trial Jury. The Charge to the Jury submitted by Judge Prado did not require the Jury to find and establish Petitioner's guilt beyond a reasonable doubt with respect to either of the following and consequently the Verdict of the Jury failed to establish Petitioner's guilt beyond a reasonable doubt with respect to either of the following:

A. That I had committed an Offense against the United States as defined in any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152;

B. That the accusations set forth in Counts I through VIII of the Indictment were material to either the bankruptcy or criminal proceedings; or

C. That the statements alleged to have been made by myself pursuant to an Unsworn Declaration Under Penalty of Perjury were made on a specific date within five years preceding the Indictment dated March 27, 1995; or

D. That one or more persons, firms or corporations suffered the loss of money or property as a consequence of any of the accusations against Petitioner set forth in the Indictment; or

E. That the bankruptcy trustee suffered any loss of money or property as a consequence of any of the accusations set forth in the Indictment.

87. At the conclusion of the Trial, the Jury returned its Verdict finding me Not Guilty of the charge in Count II and Guilty of the charges in Counts I and III through VIII as set forth in the Indictment which, as stated above, did not contain any allegations accusing Petitioner of an Offense Against the United States as defined in either of the nine (9) subsections of 18 U.S.C. Sec. 182 in conjunction with 28 U.S.C. Sec. 1746.

Post Trial – Pre-Sentencing Proceedings

88. After the conclusion of the Trial, my attorney, Royal K. Griffin, at my request, filed the following post-trial Motions:

A. Motion for Arrest of Judgment based on the failure of the Grand Jury to allege the commission of an offense against the United States in Count I, IV and V of the Indictment regarding "the O. D. Dooley Estate"

B. Motion for Acquittal based on the failure of the Grand Jury to allege the commission of an offense against the United States in Count I of the Indictment regarding "Work in Progress" and Accounts Receivable pertaining to the O. D. Dooley Estate.

C. Motion for Acquittal based on the failure of the Grand Jury to allege the commission of an offense against the United States in Counts V. and VI. of the Indictment regarding the "$102,000 Account Receivable" and the "$48,000 Referral Fee" pertaining to the O. D. Dooley Estate.

D. Motion for Acquittal based on the failure of the Grand Jury to allege the commission of an offense against the United States in Counts V. and VI. of the Indictment regarding the "$102,000 Account Receivable" and the "$48,000 Referral Fee" pertaining to the O. D. Dooley Estate.

E. Motion for Acquittal based on the failure of the Grand Jury to allege the commission of an offense against the United States in Counts V. and VI. of the Indictment regarding the concealment of the $150,000 payments made by James L. Drought.

F. Motion for Acquittal based on the failure of the Grand Jury to allege the commission of an offense against the United States in Counts I. – IV of the Indictment regarding the Accounts Receivable due from Perfect Union Lodge.

G. Supplemental Motion for Judgment of Acquittal on Count IV and Alternatively, Motion for a New Trial in Regard to I: The Unsworn Declaration Under Penalty of Perjury II: The Mistake of Counsel in Answering Question 14b and III. The Correction of the Mistake At the First Meeting of Creditors.

H. First Amended Motion for Arrest of Judgment and In the Alternative, Motion for Judgment of Acquittal and First Amended Motion for New Trial on Counts VII and VIII "The Right to Reacquire"

I. Motion for New Trial based on Erroneous Allowance of Expert Testimony Regarding the Bankruptcy Code, Rules and Regulations.

J. Motion and First Amended Motion for New Trial based on Erroneous Allowance of Expert Testimony Regarding the Bankruptcy Code, Rules and Regulations, Prosecutorial Misconduct based on the Prosecutor's unfounded accusations of "lying, cheating and stealing" and "caught with his hands in the cooking jar" and based on the Prosecutor's Statement of Personal Opinion of Embarrassment upon Prosecution of a Lawyer.

89. AUSA Mathews did not file a response to either of the Motions listed above as required by Local Rule CV-7(f). On April 1, 1997, Judge Prado entered an Order addressed to AUSA Mathews, which recites that

> "Unless the Court receives a response from the Government by April 4, 1997, the Court will grant the Motions of the Defendant."

At 3:16 p.m. on Friday, April 4, 1`997, AUSA Mathews filed "Government's Motion to Dismiss for Want of Jurisdiction" and "Government's Motion to Strike Defendants Motions for Judgment of Acquittal, New Trial and Arrest of Judgment" claiming that the Motions listed above were filed out of time and copies were not properly served upon the Prosecutor.[50]

90. Judge Prado did not schedule a Hearing or enter an Order or Ruling on either of the Motions for Acquittal

---

[50] Neither of the Motions filed by AUSA Mathews were founded in truth or in fact. Neither of the Motions filed by AUSA Mathews responded to the merits of either of the Motions listed above. To the best of my knowledge, Judge Prado made no inquiry to AUSA Mathews regarding the merits of the Motions listed above or the omissions and deficiencies in the Indictment, which were readily apparent on the face of the Indictment.

listed above but apparently in difference to AUSA Mathews simply ignored and refused to consider or rule on either of the Motions listed above.

The Sentencing Hearing and Entry of Judgment

91. On April 14, 1997, the United States Probation Officer[51] submitted a Pre-Sentence Investigation Report ("PSIR') to Judge Prado and delivered a copy to my attorney, Royal K. Griffin. Judge Prado scheduled a Sentencing Hearing on April 22, 1997, but at the request of Mr. Griffin, granted a postponement until May 23, 1997 and ordered me immediately transported to and incarcerated in the Wackenhut Facility for Parole Violation located in the Old Bexar County Jail in San Antonio, Texas.

92. On May 23, 1997, Judge Prado conducted the postponed Sentencing Hearing. The Probation Officer did not appear at the Sentencing Hearing, was not sworn as a witness, and did not offer any testimony or evidence in support of her Pre-Sentencing Investigation Report. The Pre-Sentencing Investigation Report was not offered nor admitted in evidence by the Court.

93. AUSA Mathews appeared at the Sentencing Hearing but did not offer any testimony or evidence:[52]

---

[51] Kaye L. Devon, a clerical employee in the United States Probation Office, Federal Building, Suite 310, San Antonio, Texas, prepared the Pre-Sentencing Investigation Report.

[52] AUSA Mathews had the burden of proving an acceptable evidentiary basis of facts by a preponderance of the evidence for Judge Prado's fact findings at the sentencing hearing. *United States v. Rodrigues*, 1897 kF.2d 1324, 1327-28 (5th Cir.) cert. den. 498 U.S. 857,

(Continued on following page)

A. That I had committed an Offense against the United States as defined in either of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152;

B. That the accusations set forth in Counts I through VIII of the Indictment were material to either the bankruptcy or criminal proceedings; or

C. That the statements alleged to have been made by myself pursuant to an Unsworn Declaration Under Penalty of Perjury were made on a specific date within five years preceding the Indictment dated March 27, 1995; or

D. That anyone suffered the loss of money or property as a consequence of any of the accusations against Petitioner set forth in the Indictment; or

E. That the bankruptcy trustee suffered any loss of money or property as a consequence of any of the accusations set forth in the Indictment.

94. No Creditor or Claimant in the bankruptcy proceedings appeared as a witness during the Sentencing Hearing offering to testify that I had committed or an Offense Against the United States as defined in either of the nine (9) separate and distinct subsections of 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746 or that I had committed any measure of legal or factual "bankruptcy fraud" contemplated in the either the Bankruptcy Code or the Criminal Code or that anyone suffered the loss

---

111 S.Ct. 158, 112 L.Ed.2d 124 (1990); *United States v. Ayala*, 47 F.3d 688, 690 (5th Cir. 1995)

of any money or property as a consequence of any of the accusations against Petitioner set forth in the Indictment.

95. My attorney, Royal Griffin, submitted Objections to the Pre-Sentence Investigation Report pursuant to Fed. R. Cr. Proc. Rule 32(c)(1).[53] Judge Prado failed and refused to rule on Petitioner's Objections to the Pre-Sentence Investigation Report as required by Fed. R. Cr. Proc. Rule 32(c)(1) [formerly Rule 32(c)(3)(D)] and as required by the Fifth Circuit in *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984) (Judge Prado was the then acting United States Attorney involved in the appeal in the Velasquez Case)[54]

96. My attorney offered proof that the accusations in the Indictment and consequently the Verdict of the Jury was based entirely on the answers to question 14b of the Statement of Financial Affairs and the answers to Items "q" and "v" of the Schedules of Assets and Liabilities, both of which were prepared by Harry A. Perrin, my bankruptcy attorney, based on accurate information supplied by me to Mr. Perrin, who, through inadvertence, carelessness, oversight or neglect, failed to report the pre-bankruptcy sales of the automobiles, pickup, camper, boat and airplane in answer to question 14b of the Statement of Financial Affairs filed on or about May 1, 1990.

---

[53] Fed. R. Crim. Proc. 32(c)(3)(D) and Sentencing Guidelines Sec. 6A1.3 "explicitly require that the sentencing court resolve disputed sentencing factors without regard to whether the court ultimately determines that a departure from the guidelines is warranted." *United States v. Burch*, 873 F.2d 765, 767 (5th Cir. 1989)

[54] *United States v. Lawal*, 810 F.2d 491, 493 (5th Cir. 1987) ("to ensure clarity, the Rule sets out simple requirements that area strictly construed. [citing] *United States v. Velasquez*, 748 F.2d 972 (5th Cir. 1984)

97. My attorney also submitted proof that the bankruptcy trustee paid nothing – zero – to any claimant or creditor in the bankruptcy proceedings, all of whom were paid, satisfied and their claims discharged by me acting independently of the bankruptcy trustee without order, judgment or decree of the bankruptcy judge and that no person, firm, corporation or creditor, either secured or unsecured, had sustained a monetary loss or loss of property of any amount by reasons of any of the circumstances alleged in the Indictment or disclosed during the Trial.

98. My attorney also offered proof that the bankruptcy trustee was not a victim but, to the contrary, the bankruptcy trustee had recovered $218,347.00[55] prior to the Sentencing Hearing, all of which had been consumed by fees paid to the bankruptcy trustee and his alter ego corporate attorney and associated attorneys with the result that the bankruptcy trustee did not sustain a monetary or pecuniary or property loss in any amount by reasons of any of the circumstances alleged in the Indictment or disclosed during the Trial.[56]

99. After hearing the testimony and evidence described above in rebuttal to the Pre-Sentence Investigation Report, Judge Prado again refused to rule on Petitioner's

---

[55] On September 27, 1997, Kristine Arlitt paid the bankruptcy trustee an additional $107,880.00 in order to obtain her release from the December 30, 1992 judgment in the bankruptcy court, bringing the total recovery by the bankruptcy trustee to $356,125.85, all of which was appropriated to the payment of fees paid to the bankruptcy trustee and his alter ego corporate law firm, Randolph N. Osherow, P.C. and associate attorney, Thomas Mc.Kenzie.

[56] 18 U.S.C. Sec. 3664(a) requires that the District Court "shall consider the amount of the loss sustained by any victim as a result of the offense . . . "

clear and specific Objections to the Pre-Sentence Investigation Report as required by Fed. R. Cr. Proc. Rule 32(c)(1)[57] and as required by the Fifth Circuit precedents in *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984) and *United States v. Burch*, 873 F.2d 765, 767 (5th Cir. 1989) and *United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir. 1988).

100. At the conclusion of the Sentencing Hearing on May 23, 1997, Judge Prado sentenced me to *Imprisonment* for a term of two years followed by *Supervised Release* for a term of three years[58] plus *Restitution* in the amount of $185,000 payable immediately to Randolph N. Osherow, the bankruptcy trustee. The Judgment was signed and entered on May 27, 1997. At page 6 of the Judgment, Judge Prado stated his reasons for the imposition of the Sentence as follows:

> "The court adopts the factual findings and guideline application in the presentence report. The Court finds the amount of the loss in this case,

---

[57] *United States v. Hurtado*, 846 F.2d 995, 998 (5th Cir. 1988) ("When a defendant asserts that any part of his presentence investigation report is factually incorrect, Rule 32(c)(3)(D) requires the sentencing judge to make, as to each matter controverted, "(i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be take into account in sentencing." If the sentencing judge "fails to make the requisite finding or determination, or if the finding or determination is ambiguous, the case must be remanded for resentencing." *United States v. Garcia*, 8.. F.2d 1051, 1052 (5th Cir. 1987."

[58] After having served twenty-one months of the two year Sentence at the Three Rivers Satellite Prison Camp, Three Rivers, Texas, I was transferred to a Half-Way House located at 608 Augusta in San Antonio, Texas, for 90 days and I completed the Sentence of Imprisonment on February 25, 2000 and began serving the Sentence of three years of Supervised Release which I completed on February 24, 2003.

> for guideline purposes, to be less than Two Hundred Thousand but more than One Hundred Twenty Thousand. Therefore the Court reduces the Total Offense Level by one point. The Court finds the Restitution to be in the amount of $185,000.

101. The Sentence and Judgment imposed by Judge Prado was based entirely on the Pre-Sentence Investigation Report (PSIR) referred to in the recitation appearing at page 6 of the Judgment quoted above which was adopted and relied upon by Judge Prado to the exclusion of and in the absence of a finding and Verdict by the Jury of my guilt upon proof beyond a reasonable doubt of an Offense against the United States as described in either of the nine subsections of 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 17456.

102. The "factual findings and guideline application in the presentence report" referred to by Judge Prado at page 6 of the Judgment was not included in or established by proof beyond a reasonable doubt by the Verdict rendered by the Trial Jury in this Case. Likewise, the "the amount of the loss in this case, for guideline purposes, [stated by Judge Prado] to be less than Two Hundred Thousand but more than One Hundred Twenty Thousand." referred to at page 6 of the Judgment was not included in or established by proof beyond a reasonable doubt by the Verdict rendered by the Trial Jury in this Case.

103. Judge Prado's admitted reliance on the unsworn statements and conclusions in the Presentence Investigation Report as set forth at page 6 of the Judgment to the exclusion of the findings of the Trial Jury clearly establishes that the Judgment is not founded upon or supported

by the Verdict of the Trial Jury's finding of every fact necessary to establish my guilt beyond a reasonable doubt of an Offense against the United States as defined in either of the nine (9) subsections of 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746.

104. The failure of Judge Prado to predicate the Sentence and the Judgment on the findings and Verdict of the Jury evidenced by the recitations by Judge Prado quoted above as set forth at page 6 of the Judgment reflects a clear violation of the Sixth Amendment to the Constitution, which guarantees that Petitioner "shall enjoy the right to a speedy and public trial by an impartial jury [and] to be confronted by the witnesses against him."

The Appeal

105. After the Sentencing Hearing and entry of Judgment on May 27, 1997, I filed a handwritten Motion with Judge Prado while I continued incarceration at the Old Bexar County Jail, requesting the appointment of an attorney to assist me in the Appeal of the conviction, judgment and sentence imposed upon me by Judge Prado on May 27, 1997. Thereafter, Magistrate Judge Nancy Stein Nowak appointed I. Blair McLeod, Jr.,[59] as my appellate counsel to prosecute the Appeal to the Fifth Circuit Court of Appeals. Mr. McLeod had previously retired from one of the military services and thereafter attended Law School and maintained an office in his home where he practiced principally residential real estate law.

---

[59] I. Blair McLeod, Jr., Attorney at Law, 13214 Forrest Dew, San Antonio, Texas 78232 Tel 210-499-4412

106. I also filed a handwritten Motion with Judge Prado requesting my release from the Wakenhut facility at the Old Bexar County Jail for thirty days in order to close up my office and conclude pending business affairs. On July 3, 1997 Judge Prado ordered my release and I arranged temporary residence at 210 Country Lane, San Antonio, Texas, during the period of my temporary release from confinement.

107. On or about the 6th or 7th of July, 1997, I received a Notice from the Marshals Office addressed to me at the address just stated, to report to the Federal Correctional Institution at Forrest City, Arkansas on July 8, 1997. I immediately called Judge Prado's Courtroom Deputy, Ms. Frieck, who called the Marshals Office and notified the Marshal's Office that Judge Prado had ordered my release from confinement in order to close my personal and business affairs prior to transportation to the Federal Correctional Institution. I waited for about an hour or so and called the Marshals Office and the person who answered the telephone acknowledged that the Notice to report to FCI Forrest City was rescinded.

The Direct Appeal and Applications for Writs of *Audita Querele* and *Coram Nobis*

108. Acting by a Court-appointed lawyer, I. Blair McLeod, Jr., I timely prosecuted an Appeal of the Sentence and Judgment to the United States Court of Appeals, Fifth Circuit in Docket No. 96-50444 styled United States of America v. Elwood "Jack Cluck".

109. On June 3, 1998, the Court of Appeals, Fifth Circuit, rendered an Opinion reported at 143 F.3d 174 affirming the conviction, Judgment, Sentence and Restitution

imposed upon Petitioner by the District Court. In its Opinion at footnote 9 the Court of Appeals noted:

> See *United States v. Sheinbaum*, 136 F.3d 443, 449-50 (5th Cir. 1998) (district court must reduce restitution order by any amount that defendant can show was received by victim as part of a civil settlement). Obviously, the Trustee cannot recover on both [the $185,000 restitution order and the bankruptcy court's civil judgment of December 31. 1992]. Any payment that [Petitioner made] on the 1992 order must be credited toward fulfillment of his restitution obligation and vice versa."

110. The Court of Appeals failed to consider that the bankruptcy trustee recovered $218,347.00 prior to the Sentencing Hearing, all of which was consumed by the trustee's attorney's fees, and consequently, the bankruptcy trustee was neither a "victim" nor a person who sustained a monetary or pecuniary loss as a result of any actions of Petitioner.[60]

111. The Court of Appeals failed to consider that the Offense Level mandated by USSG Sec. 2F1.1.(a) Criminal History Level I was established at Level Zero for purposes of sentencing and USSG Sec. 5B1.1(a) and Sec. 5B1.2.(a)(2) authorized a Sentence of Probation of no more than three years.

112. Thereafter, acting *pro se*, I filed an Application for Writs of *Audita Querele* and *Coram Nobis* to vacate the

---

[60] 18 U.S.C. Sec. 3663(e)(2) requires that "Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in (A) any Federal civil proceeding".

Sentence set forth in the May 27, 1997 Judgment on the grounds that there was no loss to any creditor or claimant or to the bankruptcy trustee or to the bankruptcy estate because of my actions or by reason of the circumstances alleged in the Indictment or disclosed during the Trial or at the Sentencing Hearing. Judge Prado denied the Applications for Writs of *Audita Querele* and *Coram Nobis* on August 11, 1998. I filed a Notice of Appeal, docketed as No. 98-50440, styled United States of America v. Elwood "Jack Cluck" in the Court of Appeals, Fifth Circuit. I also filed a second Notice of Appeal docketed as No. 98-50682, styled United States of America v. Elwood "Jack Cluck" in the Court of Appeals, Fifth Circuit.

The Arrest on August 14, 1998

113. At approximately 5:15 p.m. on the afternoon of August 14, 1998, Assistant Public Defender R. Clark Adams (see attached Appendix A) was proceeding easterly on Country Lane on his way to his home located at 314 Country Lane, San Antonio, Texas. As he approached the entrance driveway to my residence at 210 Country Lane (see paragraph 48 above) Mr. Adams saw several individuals who he recognized as Deputy United States Marshals, sitting in unmarked automobiles parked alongside Country Lane on either side of the entrance to 210 Country Lane. Mr. Adams waved to the Deputy United States Marshals, stopped and asked them what they were doing on his street. The principal spokesman for the group of the Marshals, joined by one or more of the others, told Mr. Adams that they (the U.S. Marshals) were "out there to arrest a man who had gotten all liquored up and threatened to kill Judge Prado". Mr. Clark Adams told the gathered Deputy Marshals that he knew whom they were

talking about because he was only one of his former clients that lived within six blocks of his house and identified myself as the subject of the proposed arrest, which the spokesman for the U.S. Marshals confirmed.

114. Shortly thereafter, at about 5:30 p.m. on the afternoon of August 14, 1998, I left my residence at 210 Country Lane driving my 1989 Chevrolet Pickup and proceeded westerly on Country Lane to Nacogdoches Road and thence north to the Exxon service station at Nacogdoches Road and Loop 410, San Antonio, Texas – unknowingly pursued in unmarked vehicles by four Deputy United States Marshals and a Bexar County Deputy Sheriff – where I stopped to vacuum my pickup and purchase gasoline in anticipation of a dinner date which I had previously arranged with a lady of my acquaintance.

115. When I arrived and stopped for gasoline at the Exxon Station, four Deputy Marshals accompanied by a Bexar County Deputy Sheriff, formed their unmarked vehicles in a semi-circle around my pickup, jumped out of their vehicles wearing vests marked with fluorescent letters "U.S. Marshals" and advanced on me with drawn handguns, shouting for my arrest. A couple of the Deputy Marshals, advancing nearer with drawn handguns, commanded me to spread-eagle my hands above my head with my feet spread apart while leaning against the side of my pickup while a couple of the remaining Deputy Marshals, without requesting or gaining my permission, searched the interior of the cab of the pickup and the tool box carried in the bed of the pickup. No guns, knives, liquor, drugs or contraband of any sort was found as a result of the unauthorized search of my pickup. The Deputy Marshals then searched my person and clothing, again without my permission and collected my wristwatch, ring, wallet, and the contents of

my pockets including the keys to my pickup. Thereupon, the Deputy Marshals handcuffed me, passed a chain around my waist, which passed through and anchored the handcuffs and shackled my ankles with another short chain. While the aforementioned activities transpired, one of the Marshals and the Bexar County Deputy Sheriff stood a short distance apart with their drawn handguns held in both hands pointed at me.

116. I asked the apparent spokesman for the Deputy Marshals for an explanation of their conduct and was furnished with a copy of the Order signed by Judge Prado entered earlier on August 14, 1998, without Notice, without a Hearing and without explanation or other formality. No other explanation was given.

117. By that time, a small crowd of onlookers had formed and the Deputy U. S. Marshals, while loudly congratulating themselves on the success of my arrest, forced me into one of their unmarked vehicles and transported me to the Wakenhut Parole Violators Facility located at the Old Bexar County Jail, San Antonio, Texas. While I was being transported to the Wakenhut Facility at the Old Bexar County Jail, the Deputy Marshal who was driving the vehicle, called on his two-way radio to his counterpart at the Marshals' Office and reported my arrest without incident and suggested to his counterpart that "You can tell the Judge he is safely in custody."

The Section 2255 Motion

118. On or about August 19, 1998, I was transported to the Federal Correctional Institution at Three Rivers, Texas, where I was held in a special Disciplinary Unit for

five days[61] and then assigned to the Satellite Prison Camp, F.C.I. Three Rivers, Texas.

119. On November 28, 1999, while I was incarcerated at the Satellite Prison Camp, I filed a pro se Motion pursuant to 28 U.S.C. Sec. 2255 to Set Aside and Vacate the Conviction and Sentence imposed against me in Docket No. SA-95-CR-099 on the grounds that the Indictment presented by the Grand Jury failed to accuse me of an offense against the United States as defined in 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec. 152 because:

A. The Grand Jury did not allege that the actions considered to be offensive under the provisions of 28 U.S.C. Sec. 1746 in conjunction with 18 U.S.C. Sec.152 are material to the bankruptcy proceedings;

B. The Grand Jury did not specify which, if either or if any of the nine (9) separate and distinct subdivisions of 18 U.S.C. Sec. 152 that Petitioner was accused of violating;

C. The Grand Jury did not allege that the Unsworn Declaration Under Penalty of Perjury authorized by 28 U.S.C. Sec. 1746 was subscribed by me and ***dated by me as the Declarant*** within five years prior to the issuance of the Indictment on March 27, 1995, or that the Unsworn Declaration Under Penalty of Perjury was material to the any

[61] The United States Marshal's Office had reported my failure to appear at the Federal Correctional Institute at Forest City, Arkansas, (paragraph 104 above) as an escape from the Wakenhut Facility at the Old Bexar County Jail.

> matter alleged to be offensive under the provisions of 28 U.S.C. Sec.1746

thereby resulting in a failure to state the commission of an offense against the United States and a lack of Subject Matter Jurisdiction and a complete miscarriage of justice.

120. Judge Prado referred the Sec. 2255 Motion to United States Magistrate Judge Nancy Stein Nowak. On June 8, 2000, Magistrate Judge Nowak filed her Report and Recommendations to Judge Prado. In her Statement of Facts appearing at page 4 o her Recommendations, Magistrate Nowak restated the grounds listed by Petitioner in his Sec. 2255 Motion resulting in lack of Subject Matter Jurisdiction[62] as follows:

> "The Indictment is fatally defective as it does not state an offense under Title 28 U.S.C. Sec. 1746 and 18 U.S.C. Sec. 152; Absence of allegations of materiality make Counts One through Eight defective; Counts One, Four and Six are fatally defective because they fail to allege movant signed the unsworn declaration within the five year limitations period; There was no loss to bankruptcy trustee or bankruptcy estate; Sentencing court erred in imposing restitution of $185,000.00."

121. At the conclusion of her Report, Magistrate Judge Nowak recommended that the Sec. 2255 Motion be

---

[62] The Magistrate Judge is an adjunct to the United States District Court and Magistrate Judge Nowak, in like manner as District Judge Prado, had the legal duty and judicial obligation at the inception of the Sec. 2255 proceedings and at all times thereafter to review the Indictment in order to assure both Magistrate Judge Nowak and District Judge Prado that the Indictment alleged the commission of an Offense Against the United States and that the District Court had Subject Matter Jurisdiction.

dismissed on the grounds that (1) the Sec. 2255 Motion was "successive" and (2) I failed to seek and obtain the consent of the Court of Appeals, Fifth Circuit, before filing my Sec. 2255 Motion in the District Court and (3) I raised or could have raised some of the issues involved in the Sec. 2255 Motion on my direct appeal.

122. Upon receipt of the Report and Recommendations of Magistrate Judge Nowak, Judge Prado had the legal duty and judicial obligation to consider the deficiencies in the Indictment based on the grounds listed in the Sec. 2255 Motion and restated at page four of the Report and Recommendations of the Magistrate Judge which indicated that the District Court lacked Subject Matter Jurisdiction.

123. On June 21, 2000, I filed "Objections to the Recommendation of the United States Magistrate Judge" which contains the following introductory paragraph appearing on pages 1-2 of the Objections:

> Petitioner's Sec. 2255 Motion seeks to set aside and vacate the conviction Judgment and sentence imposed on Petition on the grounds that the conviction and Judgment is void for lack of subject matter jurisdiction because the Indictment is defective and plainly fails to allege an offense against the United States.

followed by a clear and concise Statement of Facts and Arguments and Authorities in the form and content required by 28 U.S.C. Sec. 2255.

124. For reasons which were not then apparent but generated by the circumstances surrounding my arrest on August 14, 1989 (see paragraphs 113-117 above and Appendix A below), Judge Prado ignored the grounds

listed in my Sec. 2255 Motion and restated at page four of the Report and Recommendations of the Magistrate Judge and on July 25, 2000, Judge Prado entered an Order in which he "accepted the Magistrate's conclusion that this case should be dismissed" because:

> "[T]his application is successive. . . . Moreover, the Petitioner has taken his arguments to the United States Court of Appeals for the Fifth Circuit and the arguments have been rejected by that court. Therefore, the Court agrees with the Magistrate that this case should be dismissed."

125. I then filed a Motion to Reconsider, Rescind and Withdraw the July 25, 2000 Order of the District Court. In response, Judge Prado entered a second Order on September 27, 2000, which recites:

> "On July 25, 2000, this Court dismissed Petitioner's 28 U.S.C. section 2255 motion to vacate and set aside his conviction, judgment and sentence, concluding that the motion was successive and thus could not be filed without authorization by the United States Court of Appeals for the Fifth Circuit. . . . The Court now concludes that the determination that this motion was successive was erroneous.
>
> . . .
>
> However, the Court agrees with the Government that the issues raised in [Petitioner's Sec. 2255 Motion] either were raised in Petitioner's direct appeal or could have been raised in that appeal. . . . Petitioner has not demonstrated why he failed to raise them in his appeal or actual prejudice stemming from the alleged errors. Therefore the Court cannot reach the merits of

the Petitioner's motion and will again deny the section 2255 motion. . . ."

126. I then filed a second Motion to Reconsider, Rescind and Withdraw the latter portion of the September 27, 2000 Order, together with Requests for Findings of Fact and Conclusions of Law and a request for a Certificate of Appealability.

127. I also filed a Motion addressed to Judge Prado to Vacate and Set aside the Conviction, Judgment and Sentence in No. SA-95-CR-99(1)-EP for lack of Subject Matter Jurisdiction pursuant to 28 U.S.C. Sec. 1651 and Fed. Rules of Crim. Proc. Rule 7(c)(1), Fed. Rules of Crim. Proc. Rule 12(b)(2), the first sentence of Fed. Rules of Crim. Proc. Rule 34 and Fed. Rules of Civ. Proc. Rule 60(b)(4).

128. On November 3, 2000, Judge Prado denied my second Motion to Reconsider, Rescind and Withdraw the September 27, 2000 Order and my Motion to Vacate and Set aside the Conviction, Judgment and Sentence for lack of Subject Matter Jurisdiction and my Requests for Findings of Fact and Conclusions of Law and my request for a Certificate of Appealability. I then timely filed a second Notice of Appeal to the Court of Appeals, Fifth Circuit and a request addressed to the Court of Appeals for a Certificate of Appealability.

129. On March 27, 2001, a Panel of the Court of Appeals consisting of Circuit Judges Wiener, Higginbotham and Barksdale "construed the district court's [September 27, 2000 Order for] partial grant of post-judgment relief as a request for leave from [the Court of Appeals] to grant such relief," which the Court of Appeals granted, and remanded the proceeding to Judge Prado for

reentry of the September 27, 2000 Order "because the district court was without jurisdiction to issue its two post judgment orders [entered on September 27 and November 3, 2000]."

130. On May 24, 2001, Judge Prado re-entered the September 27, 2000 Order and denied my Motion to Vacate the Judgment for lack of Subject Matter Jurisdiction. I again filed Requests for Findings of Fact and Conclusions of Law and a request for a Supplemental Certificate of Appealability, each of which was denied by Judge Prado. I then filed a third Notice of Appeal to the Court of Appeals for the Fifth Circuit.

131. On June 29, 2001, I filed a Motion directly in the Court of Appeals, Fifth Circuit, pursuant to 28 U.S.C. Sec. 1651 and Fed. Rules of Crim. Proc. Rule 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. Rules of Civ. Proc. Rule 60(b)(4) to Vacate and Set Aside the Conviction, Judgment and Sentence in No. SA-95-CR-99(1)-EP for lack of Subject Matter Jurisdiction

132. On October 5, 2001 Circuit Judge Jacque L. Wiener, Jr. signed an Order[63] which recites that:

> "[Petitioner] alleges that there are numerous deficiencies in his indictment which, he contends,

[63] The Order was issued without the joinder, signature or initials of Circuit Judges Higginbotham and Barksdale, who together with Judge Wiener, Jr., composed the Panel to whom Petitioner's Application and Supplemental Application for a Certificate of Appealability was assigned and to whom Petitioner addressed his Motion to Vacate and Set Aside the Conviction, Judgment and Sentence in Cause No. SA-95-CR-99(1)-EP pursuant to the provisions of 28 U.S.C. Sec. 1651 and Fed. Rules of Crim. Proc. Rule 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. Rules of Civ. Proc. Rule 60(b)(4).

> deprived the trial court of its jurisdiction. He argues that he may challenge the indictment and the trial court's jurisdiction at any time, including for the first time in a Sec. 2255 motion, without having to show cause and prejudice.
>
> [Petitioner] is correct that a claim that an indictment is so deficient as to deprive the convicting court of jurisdiction presents an issue that is cognizable under a 28 U.S.C. Sec. 2255 motion. . . . [H]owever, the government did raise procedural bar in the district court. *[Petitioner] is therefore required to demonstrate cause for his procedural default and actual prejudice resulting from the errors.*

133. I filed a Motion for Panel Reconsideration of the Order signed singly by Judge Wiener on November 12, 2001, and a Motion to Recall the Mandate erroneously issued by the Clerk because the issuance of the Mandate contravenes Fed. R. App. 40(a)(1) and violated Fed. R. App. P. Rule 41(a) and (b).

134. On November 16, 2001, I mailed a Motion for En Banc Reconsideration of the Order, including a Motion for Rehearing of my Application and Supplemental Application for a Certificate of Appealability and a Rehearing of my Motion to Vacate and Set Aside the Conviction, Judgment and Sentence in No. SA-95-CR-99(1)-EP pursuant to the provisions of 28 U.S.C. Sec. 2255 and 28 U.S.C. Sec. 1651 and Fed. Rules of Crim. Proc. Rule 7(c)(1), Rule 12(b)(2), the first sentence of Rule 34 and Fed. Rules of Civ. Proc. Rule 60(b)(4).

135. On December 5, 2001, the Court of Appeals denied my Motion for Panel Reconsideration of the Order signed singly by Judge Wiener and my Motion to Recall

the Mandate. The Court did not consider or act upon on my Motion for En Banc Reconsideration of Judge Wiener's October 5, 2001 Order.

136. On December 28, 2001, I filed a Petition for a Writ of Certiorari in the Supreme Court to review the Order dated October 5, 2001 referred to above. On March 18, 2002, the Supreme Court denied my Petition for a Writ of Certiorari.

137. On May 14, 2003, Judge Prado was appointed to the Court of Appeals, Fifth Circuit, and is presently occupying that position.

138. On March 25, 2005, Petitioner filed a petition for Writ of Error Coram Nobis pursuant to 28 U.S.C. Section 1651[64] titled Motion to Vacate and Set Aside the Judgment dated May 27, 1997 entered by Judge Prado (paragraph 100 above) for Lack of Subject Matter Jurisdiction and Constitutional Violations to which was attached a Condensed Statement of Facts and Memorandum of Authorities.[65]

---

[64] In *United States v. Morgan*, 346 U.S. 502, 74 S.Ct. 247, 98 L.Ed. 248 (1954), the Supreme Court held that Section 1651 authorizes a federal *coram nobis* remedy for persons convicted in a federal court involving "errors 'of the most fundamental character' " arising because of the denial of a Constitutional right.

[65] *United States v. Morgan* was followed in *United States v. Escogbue*, 357 F.3d 532, 534-35 (5th Cir. 2004), holding that the District Court had jurisdiction to hear and determine the petition for Writ of Error Coram Nobis under 28 U.S.C. Sec. 1651 (citing *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996)) since Escogbue was no longer in custody at the time he filed his petition for Writ of Error *Coram Nobis* relief and therefore was not entitled to relief under 28 U.S.C. Sec. 2255.

139. Petitioner specifically alleged lack of Subject Matter Jurisdiction in the March 25, 2005 Motion to Vacate and Set Aside the judgment dated and filed May 27, 1997 for Lack of Subject Matter Jurisdiction and Constitutional Violations.[66]

140. Petitioner's March 25, 2005 Motion to Vacate the May 27, 1997 Judgment for Lack of Subject Matter Jurisdiction is based on the claim that Counts I through VIII of the Indictment do not allege that Petitioner committed an Offense against the United States as defined in either of the nine subsections of 18 U.S.C. Sec. 152 in conjunction with 28 U.S.C. Sec. 1746 as required by 18 U.S.C. Sec. 1345 and Sec. 3231 and therefore Judge Prado lacked Subject Matter Jurisdiction required by Article III Section 2 cl. 1 of the Constitution to entertain the Trial and impose the Judgment entered on May 27, 1997.[67]

Dated January __13__, 2006 and respectfully submitted,

/s/ Elwood Cluck

Elwood Cluck, Petitioner
No. 2 Comanche Spur
The Wilderness Box 92
Kerrville, Texas 78028
Tel. 830-896-2685

---

[66] Lack of Subject Matter Jurisdiction can be raised at any time at any stage in the proceedings by Petitioner or by the District Court or by the Court of Appeals. Fed. R. Civ. Proc. Rule 12(h)(3); *Baca v. King*, 992 F.3d 1031, 1034 (10th Cir. 1996).

[67] Petitioner has never waived or relinquished his plea of Lack of Subject Matter Jurisdiction to entertain the prosecution Trial, Sentence, Judgment and imprisonment. Subject Matter Jurisdiction cannot be waived or conferred by agreement of the parties. *Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996); *Laughlin v. Kmart*, 50 F.3d 871, 873 (10th Cir. 1995).

SWORN TO AND SUBSCRIBED before me the undersigned authority on this the __13__ day of January A.D. 2005, to certify which witness my hand and Seal of Office.

/s/ Nikki Cobb

Notary Public In and For
the State Of Texas

APPENDIX A

STATE OF TEXAS

COUNTY OF KERR

BEFORE ME, THE UNDERSIGNED AUTHORITY, on the date below stated personally appeared Elwood Cluck, also sometimes known as Elwood "Jack" Cluck, hereafter referred to as "Petitioner", a credible person to me well known who being by me first duly sworn upon his oath deposes and states that the recitations set forth in the following Appendix are true, accurate and correct:

1. On July 5, 2000, I filed a Motion for an Evidentiary Hearing in the Office of the United States District Clerk, Western District of Texas, San Antonio Division, in order to introduce documentary and factual evidence and offer legal arguments in support of the conclusion that Judge Prado lacked Subject Matter Jurisdiction due to the deficiencies in the Indictment to entertain the Indictment, conduct the Trial and Judgment and sentence me to prison.

2. Afterward, at about 10:30 or 11:00 a.m., I stopped at the office of the Public Defender, Federal Building, San Antonio, Texas, to see Clark Adams, the Attorney who

represented me prior to the Trial (see paragraph 34 above). When Clark Adams came out to the waiting room, I told him that I came because I wanted to thank him for helping me in the criminal case. He asked me to come back to his office, which I did and I again thanked him for his assistance in the criminal case and apologized for being so long about getting around to thanking him. Clark remarked that I had good excuse since I had been in prison down at Three Rivers, and he remarked I should have taken his advice and entered into a plea bargain based on his negotiations with AUSA C. Larry Mathews. I agreed that I should have done so and I asked Clark why he thought Judge Prado had entered such an excessive sentence in my Case and Clark remarked "Oh! Judge Prado just likes to hammer lawyers." And then Clark said "Why did you get all liquored up and threaten to kill the Judge." I was absolutely astounded at the remark and immediately denied having ever done so and I asked Clark where he had heard such information He told me that he was going home one evening and saw several United States Marshals who he knew standing alongside parked cars on either side of the street near the driveway entrance to 210 Country Lane, San Antonio, Texas, and he waved to them and asked them what they were doing on his street and one of the Marshals told him that they were out there to arrest a man who had gotten all liquored up and threatened to kill the Judge Prado. Clark said he knew who they were talking about because there was only one of his clients that lived within six blocks of his house. Clark said he asked the spokesman for the Marshals if it was Cluck and the Marshall answered "Yes" and identified me as the subject of the arrest. I asked Clark if Judge Prado was aware of the charges made by the Marshals at the time of the arrest and Clark indicated the charges

were "the scuttlebutt around the Courthouse." Clark and I visited a while longer and I asked him if he could be appointed as Attorney for me in the Sec. 2255 proceedings and he said "Not on your life" and then he explained "Not after your daughter had me investigated by the FBI" and then he said, "You knew she was wired and you cut it off when I had said enough." Clark used the word extort and said that he was investigated because my daughter tried to extort money from him. I told Clark that it was not he but my former wife, Kristine A. Cluck, who we were concerned with but he said again that he thought he was the subject of extortion.

3. I left Clark Adams Office and immediately went to the Office of United States Marshal Jack Dean at the United States Courthouse for the purpose of seeking verification and an explanation of the incident described to me by Clark Adams. I spoke to the receptionist, Onna M Marmolejo, and explained that I was seeking information regarding my arrest by the United States Marshals Office on August 14, 1998. Jack Dean was not in his Office and I asked for an appointment with his Chief Deputy, John Butler, who was also away from his Office but expected to return at about 1:30 p.m., the same date.

4. I returned to the U.S. Marshals Office in the Courthouse at 1:30 p.m. and asked to see Chief Deputy John Butler who had just returned from his lunch. I waited until 2:45 p.m. when Chief Deputy John Butler came out of his Office and talked with me in the reception area of the Marshals Office. His first remark was "Aren't you a lawyer?" which I acknowledged affirmatively, and Chief Deputy Butler continued by saying that he would not furnish me with the names of the arresting officers or any other information regarding my arrest by the U.S.

Marshals on August 14, 1998. I asked Chief Deputy Butler to provide me with a copy or permit me to see the official Report of my arrest made by the arresting Officers and Chief Deputy Butler became angry told me that the Record of my arrest was confidential and if I wanted any further information regarding my arrest on August 14, 1998, I would have to get it through the Freedom of Information Act since he, Chief Deputy Butler, would not provide it to me. I left the United States Marshals' Office at about 3:00 p.m. on July 5, 2000.

/s/ Elwood Cluck

Elwood Cluck, Petitioner

SWORN TO AND SUBSCRIBED before me the undersigned authority on this the _13_ day of January, A.D. 2005, to certify which witness my hand and Seal of Office.

___/s/ Nikki Cobb_____

Notary Public In and For
the State Of Texas

CERTIFICATE OF SERVICE

I Certify that an original and three (3) true and complete copies of the above and foregoing Affidavit and Appendix was enclosed in postage prepaid envelope deposited in the United States First Class Mail addressed to the and filed with the Clerk of the United States Court of Appeals, 600 Camp Street, New Orleans, Louisiana, 70130 and a true and complete copy of the above and foregoing Motion was enclosed in postage prepaid envelope deposited in the United States First Class Mail addressed

to Joseph H. Gay, Jr., Office of the United States Attorney, Western District of Texas, at his Offices at The Pyramid Building, Suite 600, 601 N. W. Loop 410, San Antonio, Texas 78216 on this the __13__ th day of January, 2005.

/s/ Elwood Cluck

Petitioner

APPENDIX 19

U.S. Const. art. III

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

APPENDIX 20

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of

---

[1] This section has been affected by the Eleventh Amendment.

law; nor shall private property be taken for public use, without just compensation.

APPENDIX 21

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

APPENDIX 22

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery

A person who –

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after, the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession. any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor, shall be fined under this title, imprisoned not more than 5 years, or both.

APPENDIX 23

18 U.S.C. § 201. Bribery of public officials and witnesses

* * *

(c) Whoever –

* * *

(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;

APPENDIX 23a

18 U.S.C. § 3231. District courts

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

APPENDIX 24

18 U.S.C. § 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

APPENDIX 25

28 U.S.C. §47. Disqualification of trial judge to hear appeal

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

APPENDIX 26

28 U.S.C. §294. Assignment of retired Justices or judges to active duty

(a) Any retired Chief Justice of the United States or associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.

(b) Any judge of the United States who has retired from regular active service under section 371(b) or 372(a) of this title shall be known and designated as a senior judge and may continue to perform such judicial duties as he is willing and able to undertake, when designated and assigned as provided in subsections (c) and (d).

(c) Any retired circuit or district judge may be designated and assigned by the chief judge or judicial council of his circuit to perform such judicial duties within the circuit as he is wiling and able to undertake. Any other retired judge of the United States may be designated and assigned by the chief judge of his court to perform such judicial duties in such court as he is willing and able to undertake.

(d) The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit, in the case of a retired circuit or district judge, or in court other than their own, in the case of other retired judges, which roster shall be known as the roster of senior judges. Any such retired judge of the United Stats may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court

outside his own circuit, in the case of a retired circuit or district judge, or in a court other than his own, in the case of any other retired judge of the United States. Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises and to any other court of the United States upon the presentation of a certificate of necessity by the chief judge of such court. No such designation or assignment shall be made to the Supreme Court.

(e) No retired Justice or judge shall perform judicial duties except when designated and assigned.

APPENDIX 27

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate,

bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

APPENDIX 28

28 U.S.C. §1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

APPENDIX 29

28 U.S.C. §1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

APPENDIX 30

28 U.S.C. §1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

_____

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

_____

(Signature)".

APPENDIX 31

28 U.S.C. §2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a habeas corpus proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

APPENDIX 32

28 U.S.C. §2255 Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this

section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.